90-355

No.——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

BARBARA A. LUCK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

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79

QUESTION PRESENTED

Should application of Section 3 First of the Railway Labor Act, which provides for the mandatory adjustment and arbitration of "[t]he disputes between an employee * * * and a carrier * * * growing out of grievances or out of the interpretation of agreements concerning rates of pay, rules, or working conditions," be restricted only to employees who are represented by unions?

PARTIES TO THE PROCEEDING

Pursuant to S. Ct. Rule 29.1, petitioner Southern Pacific Transportation Company states that it is a wholly-owned subsidiary of SPTC Holding, Inc., and that it has the following subsidiaries other than wholly-owned subsidiaries:

St. Louis Southwestern Railway Company
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
Southern Illinois and Missouri Bridge Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Central California Traction Company
The Ogden Union Railway & Depot Company
Portland Terminal Railroad Company
Portland Traction Company
Sunset Railway Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Petitioner Southern Pacific Transportation Company (hereinafter "Southern Pacific") respectfully prays that a writ of certiorari issue to review a decision of the California Court of Appeal for the First Appellate District, which was entered in the above-entitled proceeding on February 21, 1990 and modified on March 22, 1990.

OPINIONS BELOW

The opinion of the California Court of Appeal affirming the trial court order and denying fees is reprinted in full in the appendix hereto ("App.") at 1a. The decision of that court denying Southern Pacific's petition for rehearing and modifying opinion is printed in full at App. 48a, and the opinion as modified is officially reported in part at 218 Cal. App. 3d 1 and unofficially reported

in part at 267 Cal. Rptr. 618. The decision of the Supreme Court of California denying Southern Pacific's petition for review is unreported and is printed at App. 52a.

JURISDICTION

The decision of the California Court of Appeal was entered on February 21, 1990 and modified on March 22, 1990. Southern Pacific's timely petition for review filed with the Supreme Court of California was denied on May 31, 1990. This petition for writ of certiorari is filed within ninety days of the order entered by the Supreme Court of California. *See* 28 U.S.C. § 2101(c). The jurisdiction of this Court to review the judgment of the California Court of Appeal rests on 28 U.S.C. § 1257(a).

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 1 of the Railway Labor Act, 45 U.S.C. § 151, provides in pertinent part:

> Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders. * * *

Section 2 of the Railway Labor Act, 45 U.S.C. §§ 151a, 152, provides in pertinent part:

> The purposes of the Chapter are: * * * (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) to provide for the prompt and orderly settlement of all

> disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153, First (i), provides:

> The disputes between an employee or a group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

The Supremacy Clause, Art. VI, cl. 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

A. Factual Background

Southern Pacific is a railroad engaged in interstate commerce and subject to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* RT 1399.[1] In 1984, in an effort to curb a long-standing problem of drug and alcohol abuse, Southern Pacific initiated a drug testing program in its Operating Department,—the department responsible for the movement of trains and equipment. RT 946, 950, 1193-94, 1437-39. Because of the success of that program in reducing work-related injuries, in July 1985 Southern Pacific extended its drug testing program to its Engineering Department.

The Engineering Department is responsible for the maintenance and repair of the track and roadbed. RT 1378, 1833-34. It also is responsible for the design and maintenance of the bridges and trestles over which the trains operate. RT 801, 1376, 1388. Any defect in the track, roadbed, or bridges can lead to operational hazards and can cause train derailments.[2] Because of this clear relationship between the Engineering Department and operational safety, all employees in the department were required to participate in the drug testing program. App. 3a; Ex. 4; RT 644. The test was random only in the sense that the date for the test was arbitrarily selected by Southern Pacific so as not to forewarn the affected employees.

In 1979, Respondent Barbara Luck (hereinafter "Luck") began working for Southern Pacific as a draftsperson in the Signal Department. App. 2a. The terms and conditions of her employment were governed by a union-negotiated collective bargaining agreement. RT

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[1] "RT" refers to the Reporter's Transcript, "Ex." to the trial exhibits, and "CT" to the Clerk's Transcript.

[2] Southern Pacific has experienced numerous derailments as a result of defective track or roadbed. Ex. 5; RT 1378-79, 1381, 1844.

415. Subsequently, Luck was promoted to the position of computer programmer in the Engineering Department. There, she was an "exempt," or non-union, employee and was not covered by a collective bargaining agreement. App. 2a, 4a; RT 584.

At the time Luck began her term of employment—and indeed, for the last 80 years—railroads (including Southern Pacific) had a rule, known as "Rule G," which prohibits the use of illegal drugs by all employees on duty or subject to duty. RT 946, 950. In March 1979, Luck consented and submitted to a pre-employment urinalysis as a condition of being accepted for employment. RT 410-413. Luck also signed a form permitting Southern Pacific to conduct medical examinations and tests in the future. RT 577.

On July 11, 1985, Luck, along with all other Southern Pacific Engineering Department employees, was instructed to submit to a drug test. App. 3a. She was requested to proceed to a restroom to provide a urine sample for testing. The testing procedure was supervised by nurses from Southern Pacific's Medical Department. RT 1335-37. Employees were not observed in the process of providing samples.

Luck refused to consent to the drug test and refused to provide a urine sample. App. 3a. Over the course of the next several days, Southern Pacific representatives spoke with her in an effort to learn her objections and, possibly, modify the program so as to eliminate them. Ex. 7; RT 459-465, 469-471, 474-483, 671. For example, Southern Pacific offered Luck the option of having the test administered in the offices of her personal physician. She declined. RT 439, 672.

On July 15, 1985, when efforts to reach an accommodation with Luck proved unsuccessful, Southern Pacific removed her from the position of computer programmer on the ground that she had been "insubordinate." App.

3a. Luck was afforded an opportunity, however, to return to the Signal Department. RT 535-536. Although she would have retained full seniority, Luck declined to resume her former position. Three days later, she filed a complaint in the San Francisco County Superior Court.

B. Procedural History

Luck's complaint alleged state causes of action for wrongful termination in violation of public policy, breach of the implied covenant of good faith and fair dealing, invasion of privacy, negligent and intentional infliction of emotional distress, and negligent misrepresentation. The trial court granted Southern Pacific's motions for nonsuit or directed verdict as to several of her claims. RT 1147, 2018; CT 785-789. However, the court permitted Luck's remaining causes of action to go to the jury, and it returned a verdict in her favor. She was awarded damages totalling $485,042, which consisted of $180,092 in back pay, $32,100 for emotional distress, and $272,850 in punitive damages. App. 4a. The trial court entered a judgment on the jury's verdict.

The California Court of Appeal upheld the judgment that had been entered in favor of Luck on two state law claims: (1) breach of the covenant of good faith and fair dealing, and (2) intentional infliction of emotional distress. App. 2a.[3] The court found that neither of these claims was preempted by the Railway Labor Act. App. 4a-7a. Its holding on the preemption issue was premised entirely upon the fact that Luck was a non-union employee. The court found that "the RLA Adjustment Board has no jurisdiction over disputes that do not arise out of collective bargaining agreements." App. 7a.

The Court of Appeal did not find the Railway Labor Act inapplicable on the ground that there was no employ-

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[3] The Court of Appeal held that "Luck did not state a cause of action for wrongful termination in violation of public policy." App. 32a.

ment agreement. To the contrary, Luck's claim that Southern Pacific breached the covenant of good faith and fair dealing depended entirely upon the existence of a contract. This cause of action was "an allegation of breach of contract and [arose] out of the contract itself." App. 9a. According to the court, although there was no written employment agreement between petitioner and respondent, "the jury impliedly found that a contract existed." App. 10a.[4]

Southern Pacific petitioned the Court of Appeal for rehearing. Although the Court of Appeal modified in part its earlier opinion regarding preemption, the petition was denied. App. 49a-51a. Southern Pacific then petitioned the California Supreme Court for review. By order dated May 31, 1990, the California Supreme Court denied the petition. App. 52a.

REASONS FOR GRANTING THE WRIT

The Railway Labor Act, 45 U.S.C. § 151 *et seq.*, "provides a comprehensive framework for the resolution of labor disputes in the railroad industry." *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557, 562 (1987). Crucial to the comprehensive scheme is Section 3 First of the Act, which provides that "disputes between an employee * * * and a carrier * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" shall be decided by the National Railroad Adjustment Board. 45 U.S.C. § 153, First (i). This Court has held that "wrongful discharge" claims filed by railroad employees must be adjusted and arbitrated pursuant to the Act when the discharged employee is covered by a collective bargaining agreement. *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 323-334 (1972). The question presented here is whether that holding, which effectively preempts

[4] The court held that "the jury's implied finding that a contract existed [was] supported by substantial evidence." App. 12a.

"wrongful discharge" claims filed under state law, applies to all classes of railroad employees, or whether it applies only to those employees who are covered by collective bargaining agreements.

The California Court of Appeal declined to follow *Andrews* because the terms of Luck's employment were governed not by a collective bargaining agreement, but by an individual employment contract implied by law. This holding establishes a dichotomy between the "wrongful discharge" claims of union members and those of non-members. This dichotomy is inconsistent with the plain language of the Railway Labor Act, its legislative history, and the decisions of those federal courts that have dealt with the issue. Given the decline in union membership and the burgeoning growth of "wrongful discharge" cases, it is important that the Court grant certiorari and eliminate this unwarranted distinction between union and non-union employees.

I. THE RAILWAY LABOR ACT SHOULD PREEMPT "WRONGFUL DISCHARGE" CLAIMS OF ALL EMPLOYEES

The California Court of Appeal held that "wrongful discharge" claims arising under state law are preempted by the Railway Labor Act only if the discharged employee was covered by a collective bargaining agreement. There is no justification for such a holding.

A. Plain Language of the Act

This Court, particularly in recent years, has insisted upon a plain-meaning view of federal statutes. If its language is clear, a statute should be construed as the ordinary person would read it. Only if the language is ambiguous do courts turn to legislative history in an attempt to define congressional intent.[5] We submit that the

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[5] *E.g., Texaco, Inc.* v. *Hasbrouck*, —— U.S. ——, 110 S. Ct. 2535 (1990); *Adams Fruit Co.* v. *Barrett*, —— U.S. ——, 110 S. Ct.

relevant language of the Railway Labor Act is clear and unambiguous: a specified dispute between a railroad and its employee must be resolved by adjustment and arbitration, regardless of whether that employee is covered by a collective bargaining agreement.

The Railway Labor Act provides for mandatory adjustment and arbitration of disputes that involve "agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153, First (i). This language does not limit the Act's coverage to disputes involving collective bargaining agreements; by its terms, the Act covers all employment contracts. Moreover, the broad language of the statute includes not only written agreements, but also oral contracts and contracts implied by law. Certainly the plain meaning of the statutory language would encompass the contract that the jury found existed between Luck and Southern Pacific.[6]

The court did not dispute that the controversy grew out of an employment contract. On the contrary, the court expressly found Luck's state law claims to be premised upon her employment contract with Southern Pacific. App. 9a-12a. Nor did the court contend that Luck's employment agreement did not "concern[] rates of pay, rules, or working conditions." Instead, the court simply concluded, *ipse dixit*, that because the agreement was not a "collective bargaining agreement," adjustment

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1384 (1990); *Public Employees Retirement Hallstrom* v. *Tillamook County*, —— U.S. ——, 110 S. Ct. 304 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 835-836 (1988); *Bethesda Hospital Ass'n* v. *Bowen*, 485 U.S. 399, 403-404 (1988); *United States* v. *James*, 478 U.S. 597, 606 (1986); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[6] The court also examined Luck's physical examination consent form, which was signed at the time she was hired, to determine whether she consented to urinalysis. App. 26a-27a. The court "agree[d] with the trial court that the language of the contract [was] ambiguous." App. 27a.

and arbitration could be by-passed.[7] But the statute contains no such requirement.

Other statutory language likewise indicates that the Railway Labor Act preempts wrongful discharge claims filed by non-union employees. The Act explicitly applies to disputes growing out of "grievances." Moreover, the use of the disjunctive "or" indicates that "grievances" has a meaning independent and apart from disputes concerning the proper interpretation of employment agreements. Therefore, even if the California Court of Appeal were correct in holding that the term "agreements" encompassed only union-negotiated collective bargaining agreements, respondent's claim nevertheless would be preempted. Her state law claims constitute "grievances" within the plain meaning of that word.[8]

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[7] The California court's refusal to find these claims preempted was based entirely upon its holding that the "Adjustment Board has no jurisdiction over disputes that do not arise out of *collective bargaining agreements*." App. 7a (emphasis added).

Nothing in the opinion indicates that Luck's employment contract was a covered "agreement" but that her dispute did not "grow" out of it. The court would have been hard-pressed to reach such a conclusion. The federal and state courts uniformly have held that the Railway Labor Act preempts "wrongful discharge" claims, regardless of the terms in which they are concluded. *See, e.g., Minehart* v. *Louisville & Nash. R.R.*, 731 F.2d 342 (6th Cir. 1984) ("retaliatory discharge"); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) ("intentional infliction of emotional distress"); *DeTomaso* v. *Pan American World Airways, Inc.*, 43 Cal. 3d 517, 235 Cal. Rptr. 292, 733 P.2d 614, *cert. denied*, 484 U.S. 829 (1987) ("intentional infliction of emotional distress"). The courts have seen these "wrongful discharge" suits, when pled in tort, "as end runs around the Railway Labor Act's policy of channeling employment disputes to arbitration." *Lancaster* v. *Norfolk & Western Ry.*, 773 F.2d 807, 815 (7th Cir. 1985).

[8] *See* Webster's Ninth New Collegiate Dictionary 537 (9th ed. 1989) ("grievance" is "a cause of distress (as an unsatisfactory working condition) felt to afford reason for complaint or resistance").

Also noteworthy is the fact that the Act by its terms applies to disputes between a railroad and an "employee." As that term is ordinarily used, it would encompass non-union workers such as Luck. Moreover, the definitional section of the Act provides that "[t]he term 'employee' * * * includes *every person in the service of a carrier* * * * who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission." 45 U.S.C. § 151, Fifth (emphasis added). The relevant I.C.C. order defines and classifies almost all workers, including computer programmers, as either "employees" or "subordinate officials." *See* 49 C.F.R. § 1245 (1989). Certainly, the I.C.C. did not depart from the plain meaning of the statute by defining the term "employee" in a way that excludes non-union members.

In sum, the plain language of the Railway Labor Act clearly preempts "wrongful discharge" claims filed by non-union "employees." Whether such claims are treated as disputes concerning covered employment agreements or as "grievances," their arbitration is mandatory under the Act.

B. The Legislative History

This interpretation of the Act is supported by its legislative history, which demonstrates that Congress intended for it to apply to disputes between railroads and non-union workers at all levels. In fact, the original drafters of the statutory language at issue here—and the adopting Congress—expressly considered the very question raised before the California court and reached the opposite conclusion.

During the Senate debates concerning the enactment of the Railway Labor Act in 1926,[9] the Senate expressly

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[9] The statutory language at issue here was first included in § 3 First (c) of the 1926 Act, which provided that each railroad and

considered whether non-union employees were subject to the provisions of the Act:

> Mr. King. Mr. President, I have examined this bill with some little care; and I am not quite able to determine, and I shall be glad to be advised by the chairman or some other member of the committee if they care to do so, *whether employees not members of a union have any right to be represented or covered by or have the advantages of the bill;* whether they are to be included in the groups which seem to be contemplated by the bill; and if not, how their rights are to be protected.
>
> Obviously, a bill designed to prevent controversies between the carriers and their employees ought to afford every opportunity to all employees, whether they belong to a group or whether they are outside of a group. Some who are supporters of the bill tell me that undoubtedly it was intended that *every employee should have all of the advantages that this bill provides in the way of conciliation, mediation, and so forth.* I shall be glad to know from those who framed the bill whether there is full protection for all employees, *whether they belong to a union or whether they do not,* whether they are members of a small union or whether they are members of a big union.
>
> Mr. Watson. Mr. President, I can say to my friend that that question was discussed in the committee. I have no doubt that the present language covers all the unions and *all those that are not members of unions.*

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its employees would enter into adjustment agreements and appoint adjustment boards. *See* Railway Labor Act, ch. 347, § 3, 44 Stat. 577, 578-579 (1926) (current version at 45 U.S.C. § 153). Section 3 was amended in 1934 to replace individual adjustment boards with the National Railroad Adjustment Board. However, there is no indication that the amending Congress intended to change the meaning of the pertinent statutory language or the scope of employees and disputes subject to the adjustment procedures.

> Mr. King. All employees of every grade, kind, character, and description?
>
> Mr. Watson. *That is my judgment about it.* That is the judgment of Mr. Richberg, who, as the Senator knows, is a very able lawyer and with whom I have discussed this particular question several times, and also two or three of the heads of the organizations, and also Mr. Thom. * * * They all state to me that *beyond any doubt in the world all* classes and groups and *individuals are covered.* [*Legislative History of the Railway Labor Act, as Amended (1926 through 1966)*, 93d Cong., 2d Sess. 689-690 (1974) (emphasis added).]

Following this lengthy but informative exchange, Senator Watson stated specifically that the adjustment procedures "cover[ed] * * * every individual employee who has a grievance * * * or any person not a member of any organization of employees." *Id.* at 690. Senator Wheeler confirmed that Senator Watson's view was shared "by all the members of the committee." *Id.* at 691.[10]

Thus, Congress clearly contemplated that employees of every class—including non-unionized employee groups—would be subject to the adjustment provisions in the Act. By limiting the application of those procedures to employee disputes arising from collective bargaining agreements, the California Court of Appeal has drawn an essential distinction between unionized and non-unionized employee groups in the railroad industry—a distinction fundamentally at odds with the Act's plain legislative history.

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[10] Senator King stated, "I think the interpretation placed upon the language the Senator just read is the only one that can be placed upon it, and it seems to me that unless that interpretation is placed upon it, the Senator ought to offer an amendment that will afford full protection to every employee working for the carrier." *Id.* No amendment was offered.

C. Federal Case Law

Unlike the California Court of Appeal, the federal courts that have addressed the issue presented here have interpreted the Railway Labor Act in a manner consistent with the statute's language and legislative history. In *Elgin J. & E. Ry.* v. *Burley*, 325 U.S. 711 (1945), this Court stated that an employment dispute is subject to arbitration and the Act if it

> relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future. [*Id.* at 723.]

This language, which was quoted with approval in *Consolidated Rail Corp.* v. *Railway Labor Executives Association*, —— U.S. ——, 109 S. Ct. 2477 (1989), clearly indicates that a dispute is arbitrable regardless of whether it relates to a collective bargaining agreement. Although the discussion in *Burley* is arguably *dicta*, it is consistent with the holdings of the Sixth, Tenth, and Eleventh Circuits.

In *Thomas* v. *New York, Chicago & St. Louis R.R.*, 185 F.2d 614 (6th Cir. 1950), the court held that the Adjustment Board had jurisdiction over the claims of a discharged employee even though he was not a union member. It was unimportant that the adjudication of the dispute would not involve the interpretation of a collective bargaining argument. Citing *Burley*, the court simply held that the dispute was covered by the plain language of the Railway Labor Act.[11] The Eleventh Circuit

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[11] Although the court found that the case properly belonged in arbitration, it overturned the judgment of the Adjustment Board. The Sixth Circuit's holding was justified on the ground that the

subsequently relied upon *Thomas* in holding that a wrongful termination claim is subject to arbitration even if the discharged employee is not a union member. *Womble* v. *Seaboard Systems R.R.*, 804 F.2d 635 (11th Cir. 1986) (*per curiam*), *cert. denied*, 481 U.S. 1051 (1987).

Thomas and *Womble* appear to be the only United States Court of Appeals decisions explicitly addressing the applicability of the Railway Labor Act to wrongful termination claims filed by non-union employees. The Tenth Circuit has indicated, however, in a case involving a union member, that claims are subject to mandatory arbitration even if they do not involve the interpretation of a collective bargaining agreement. In *Hodges* v. *Atchison, T. & S.F. Ry.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984), a discharged union member argued that the Railway Labor Act did not preempt his claim because "it [was] based on a common law contract rather than a collective bargaining agreement." *Id.* at 416. The court held that the discharged employee was "still obliged to seek relief primarily and exclusively through arbitration." *Id.* at 417. According to the Tenth Circuit, it did not matter that "Mr. Hodges allege[d] breach of an employment agreement and not the collective bargaining agreement." *Id.* at 416-417.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

By restricting application of the Railway Labor Act's adjustment procedures to unionized employee groups, the California court's decision strikes at the heart of the sole purpose of the Act: to "provide[] a comprehensive framework for the resolution of labor disputes in the

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discharged employee had introduced no evidence indicating that "any individual contract between appellant and the carrier limited the prerogative of discharge." *Id.* at 617. The court thus intimated that if such an individual employment contract existed, it would have been interpreted by the Adjustment Board

railroad industry." *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. at 562. The adjustment procedures are crucial to that comprehensive scheme. "The Adjustment Board was created as a tribunal * * * to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978) (*per curiam*).

Congress recognized that if such disputes were not settled expeditiously and with some degree of finality, their collective weight could interrupt "commerce or * * * the operation of [a] carrier." 45 U.S.C. § 151a. In order to avoid such costly interruptions in the railroad industry, Congress subjected these employment disputes to mandatory adjustment. "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific R.R.* v. *Sheehan*, 439 U.S. at 94, *citing Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30, 40 (1957).

If allowed to stand, the California appellate court decision would create an intolerable dichotomy between unionized and non-unionized employee groups in the railroad industry, leaving non-union employees free to ignore the mandatory dispute adjustment procedures provided by the Act, while requiring union employees to submit their disputes to the Adjustment Board and forego their judicial remedy.[12] Lawsuits filed by non-union employees

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[12] The California court decision would also deprive members of non-unionized employee groups of their statutory right to invoke the Act's adjustment procedures. It must be remembered that many of the characteristics of dispute adjustment work to the advantage of the employee. As the Court recognized in *Sheehan*:

> Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. [439 U.S. at 94 (*citing Union Pacific R.R.* v. *Price*, 360 U.S. 601, 613-614 (1959)).]

interrupt the operation of a railroad no less than lawsuits filed by their union counterparts.[13] Exclusion of non-unionized employee groups from the Act's adjustment procedures would substantially undercut the important legislative aims which those procedures were intended to serve.

Those aims include the need for "uniformity * * * throughout the nation's railway systems" and the desirability of having railway employee disputes heard by a tribunal familiar with the usage and customs in the railroad industry. *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950). As this Court has recognized, "[t]he Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon." *Id.* (footnote omitted).

Nor should the California court decision challenged here be seen as an aberration. In fact, the *Luck* decision drew heavily from the decision of another California appellate court, *Mungo* v. *UTA French Airlines*, 166 Cal. App. 3d 327, 212 Cal. Rptr. 369 (1985), in which the court also held that employees not covered by collective bargaining agreements were excluded from the Railway Labor Act's adjustment provisions. *Id.* at 332, 212 Cal. Rptr. at 372. *Mungo* was decided over five years ago and remains good law in California, the nation's most populous state. Other state courts have similarly held that the Act's adjustment procedures apply only to employees seeking to enforce rights arising under union-negotiated collective bargaining agreements. *See Cummings* v. *National Railroad Passenger Corp. (Amtrak)*, 514 Pa. 230, 240-242, 523 A.2d 338, 343-344, *cert. denied*,

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[13] In 1988, only 35.4% of employees in the transportation and public utilities industries were union members or covered by collective bargaining agreements. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1990*, 419 (1990). That percentage has declined from 46.2% in 1983. *Id.*

484 U.S. 852 (1987); *Hollars* v. *Southern Pacific Transportation Co.*, 792 P.2d 1146, 1150 (N.M. App. 1989), *cert. quashed*, —— N.M. —— (1990).

In stark contrast to the state court decisions, the United States Courts of Appeals have held that the Act's adjustment procedures apply to all railroad employees, including employees who are not seeking to enforce collective bargaining agreements. *See Womble* v. *Seaboard Systems R.R.*, 804 F.2d at 635; *Hodges* v. *Atchison, T. & S.F. Ry.*, 728 F.2d at 416-417; *Thomas* v. *New York Chicago & St. Louis R.R.*, 185 F.2d at 616. A decision by this Court is necessary to resolve this conflict between state and federal courts.[14]

The issue at hand is especially compelling in the factual context in which it is now presented for review: a wrongful discharge lawsuit challenging a railroad employer's drug-testing program. Wrongful discharge suits are being filed by employees in ever-increasing numbers. *See* W.B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 Employee Relations L. J. 404, 405-406 (1987). At the same time, throughout the United States employers in the transportation industry are in the process of implementing polices designed to ensure a drug-free workplace and the safety of the traveling public. These policies have and unquestionably will continue to give rise to inumerable lawsuits by employees in state and federal courts.

Throughout the railroad industry, this important subject of drug testing will remain in confusion if the decision below stands. Arbitration will be mandated only for those covered by collective bargaining agreements; em-

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[14] In *Luck*, the court's decision was reached in light of what it called "conflicting federal authority on this issue." App. 50a. While we believe that the pertinent federal cases fully support Southern Pacific's interpretation of the Act, the perception by state courts of apparently "conflicting federal authority" calls for a definitive ruling by this Court on the issue.

ployees who are not covered will be free to bring lawsuits, with the possibility of recovering substantial damages—in Luck's case, over $480,000. Many employees throughout railroads such as Southern Pacific are covered by collective bargaining agreements, but there are other employees with substantially the same caliber positions who are not. And many employees in non-union jobs are in a position to affect significantly the safety of other employees and of the public. This crazy-quilt system may have a detrimental impact on drug testing. And the irony is that Southern Pacific was attempting to treat all of its employees the same, as it should.

Two years ago, this Court recognized the significance of these issues when it granted certiorari in *Consolidated Rail Corp.* v. *Railway Labor Executives Association*, —— U.S. ——, 109 S. Ct. 2477 (1989) ("Conrail"). In *Conrail*, the Court held that disputes arising from a railroad employer's drug-testing program were "minor disputes" which could be subject to the Act's adjustment procedures under a union employee's collective bargaining agreement. However, *Conrail* left open a critical question: whether *non-union* railroad employees must also submit their contractual disputes regarding drug-testing policies to the Adjustment Board.[15] In view of its overriding national importance, this issue should be addressed by the Court.

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[15] *See also Skinner* v. *Railway Labor Executives Ass'n*, 109 S. Ct. 1402, 1419-21 (1989) (recognizing compelling government interest in preventing drug use by railway employees).

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

CERTIFIED FOR PARTIAL PUBLICATION.*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

A040995

San Francisco County
(Super. Ct. No. 843230)

BARBARA A. LUCK,
Plaintiff and Respondent,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant and Appellant.

A042205

San Francisco County
(Super. Ct. No. 843230)

BARBARA A. LUCK,
Plaintiff and Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication with the exception of part V.

Appellant Barbara A. Luck, a computer programmer employed by appellant Southern Pacific Transportation Company, was fired when she refused to submit a urine sample as part of an unannounced drug test by her employer. At trial, the jury awarded Luck $485,042 on her claims of wrongful termination, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress. Southern Pacific appeals (Case No. A040995), contending that (1) the federal Railway Labor Act preempts Luck's claims; (2) the state constitutional right to privacy does not prohibit it from requiring its employees to submit to drug urinalysis; (3) there was no breach of the implied covenant of good faith and fair dealing nor wrongful termination in violation of public policy; (4) punitive damages were not merited; and (5) Luck failed to mitigate damages. Although we find that several of Luck's theories of liability are without legal support, the jury's verdict can be upheld on proper grounds. Therefore, we affirm the judgment.

After trial, Luck applied for an award of attorney fees, without success. She appeals this ruling (Case No. A042205), contending that she is entitled to fees at both trial and appellate levels. We affirm the trial court order and deny her petition for fees on appeal.

I. FACTS

In July 1985, appellant Barbara A. Luck had been employed for almost six and a half years by appellant Southern Pacific Transportation Company (Southern Pacific). She had been hired in 1979 as a signal department draftsperson and spent the next three months coloring copies of design prints. Then, she accepted a position as the department's computer operator, maintaining its data base of railroad track crossroads locations. After two years in this position, she was promoted to computer programmer. For the last four years of her employment, she worked collecting information used to manage the

engineering department. She wrote computer programs, taught others how to use them, and ran reports describing what employees did each day, where company equipment was located, and how much material was being used by employees.

On July 11, 1985, Luck and all other Southern Pacific engineering department employees were instructed to provide a urine sample and to consent to its testing for drugs, alcohol or medications. She viewed this as an offensive request and refused to comply. Luck met with several Southern Pacific officials that day and the next, but remained steadfast in her refusal to take the test. Company officials told her that they had no reason to believe that she was impaired in her job performance. After these meetings, Luck believed that she had been suspended, but that before Southern Pacific took any further action she would be given a hearing. In a July 15 letter, Luck learned that she had been "relieved of all duties connected with [her] former position as Engineering Programmer" for failing to comply with the instructions of proper authority, i.e., for insubordination.[1]

Luck filed suit against Southern Pacific.[2] The case was tried on her second amended complaint[3] with the

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[1] In November 1985, the San Francisco Board of Supervisors adopted an ordinance barring city employers from compelling employees to submit to random drug tests. The July 1985 drug testing at Southern Pacific occurred before this time.

[2] Luck also named as defendants Southern Pacific mangerial employees Rodney Snyder, M.J. Karlovic, and D.I. O'Callaghan. The trial court found that these employees could not be held individually liable and dismissed the action against them. Luck appealed this decision, but dismissed the appeal after she obtained judgment against Southern Pacific in the trial court.

[3] The complaint stated causes of action for wrongful termination in violation of public policy, breach of the implied covenant of good faith and fair dealing, invasion of privacy, negligent and intentional infliction of emotional distress, and negligent misrepresentation. The trial court granted Southern Pacific's motions for non-

jury returning verdicts in her favor on her causes of action for wrongful termination in violation of public policy, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. The jury awarded Luck $180,092 in economic damages for lost compensation and benefits, $32,100 for emotional distress, and $272,850 in punitive damages. The trial court denied her posttrial motion for attorney fees.

II. FEDERAL PREEMPTION

First, Southern Pacific contends that the trial court had no jurisdiction to try this case—that the federal Railway Labor Act (RLA) compels arbitration of Luck's wrongful termination claim and thus preempts her case. (See 45 U.S.C. §§ 151-188; see also 45 U.S.C. § 153, subd. (i).)[4] At trial, Southern Pacific's motion for nonsuit on this ground was denied. Although Luck was a union member when she was first hired by Southern Pacific, she was an exempt (nonunion) employee not covered by a collective bargaining agreement at the time of termination. Southern Pacific contends that the RLA requires even nonunion employees to submit claims to arbitration before the Adjustment Board. Courts are reluctant to infer preemption, which Southern Pacific—as the party urging it—bears the burden of establishing.

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suit on invasion of privacy and for directed verdict on negligent misrepresentation. Negligent infliction of emotional distress was not submitted to the jury.

[4] Subdivision (i) of section 153 of title 45 of the United States Code provides: "The disputes between an employee or a group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner . . .; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

(See *Mungo* v. *UTA French Airlines* (1985) 166 Cal. App.3d 327, 332.)

Federal legislation and case law guide state courts in matters presenting federal jurisdictional issues. (*Mungo* v. *UTA French Airlines, supra,* 166 Cal.App.3d at p. 331.) Congress enacted the RLA to promote stability in the railroad industry and to provide for prompt and efficient resolution of labor-management disputes arising out of railroad collective bargaining agreements. (*Evans* v. *Southern Pacific Transportation Co.* (1989) 213 Cal. App.3d 1378, 1383; see *Lewy* v. *Southern Pacific Transp. Co.* (9th Cir. 1986) 799 F.2d 1281, 1289.) The RLA creates a mandatory grievance procedure for resolution of "minor disputes." Minor disputes under the RLA involve the interpretation or application of an existing collective bargaining agreement. (*Leu* v. *Norfolk & Western Ry. Co.* (7th Cir. 1987) 820 F.2d 825, 828, fn. 7.) A minor dispute " 'contemplates the existence of a collective [bargaining] agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.' " (*Consolidated Rail* v. *Labor Executives* (1989) 491 U.S. ——, —— - —— [105 L.Ed.2d 250, 261-262]; see *Leu* v. *Norfolk & Western Ry. Co., supra,* 820 F.2d at p. 828, fn. 7; *Switchmen's Union of North America* v. *Southern Pacific Co.* (9th Cir. 1968) 398 F.2d 443, 445; see also *Miller* v. *Norfolk and Western Ry. Co.* (6th Cir. 1987) 834 F.2d 556, 561 [remand to determine whether defamation claim required interpretation of collective bargaining agreement].) The RLA's grievance procedures are exclusive; if the act applies, it preempts state and federal courts of subject matter jurisdiction over minor disputes. (*Consolidated Rail* v. *Labor Executives, supra,* 491 U.S. at p. —— [105 L.Ed.2d at p. 262]; see *Locomotive Engrs.* v. *L. &*

N. R. Co. (1963) 373 U.S. 33, 38; *Leu* v. *Norfolk & Western Ry. Co., supra*, at p. 828.) Any grievance arising out of a collective bargaining agreement is a minor dispute preempted by the act. (*Leu* v. *Norfolk & Western Ry. Co., supra*, at p. 829.)

A California appellate court has held that the RLA does not preempt a wrongful termination action brought by a nonunion employee when the dispute does not arise out of a collective bargaining agreement. (*Mungo* v. *UTA French Airlines, supra*, 166 Cal.App.3d at pp. 330-332.) Southern Pacific contends that this case was wrongly decided because it failed to consider several cases in which nonunion employees were required to submit their claims to the RLA Adjustment Board. However, these cases all involve claims that required the application or interpretation of a collective bargaining agreement. (See *Thomas* v. *New York, Chicago & St. Louis R. Co.* (6th Cir. 1950) 185 F.2d 614, 615-617 [board had jurisdiction to consider claim of nonunion employee whose contract did not provide standards for termination, when employee was given benefit of collective bargaining agreement's standards for termination]; *Patterson* v. *Chicago & Eastern Illinois R. Co.* (N.D. Ill. 1943) 50 F.Supp. 334, 336-337 [nonunion former employee claimed railroad wrongfully refused to reinstate him according to terms of collective bargaining agreement].)[6] Under these cases, even nonunion employees

[6] Southern Pacific cites a third case in support of its position, but this reliance is also misplaced. The Eleventh Circuit recently held that a terminated nonunion employee was required to pursue an administrative remedy under the RLA rather than bring an action in federal court. (*Womble* v. *Seaboard System Railroad* (11th Cir. 1986) 804 F.2d 635, cert. den. 481 U.S. 1051.) The decision is two paragraphs long: the first paragraph states a few facts, the second announces its conclusion and cites three cases, without any explanation of its reasoning. As each of the cited cases involves a collective bargaining agreement (see *Andrews* v. *Louisville & Nashville R. Co.* (1972) 406 U.S. 320, 324 [collective bargaining agreement is source

must submit to arbitration under the act. However, the RLA Adjustment Board has no jurisdiction over disputes that do not arise out of collective bargaining agreements. (*Mungo* v. *UTA French Airlines, supra,* 166 Cal.App.3d at p. 331.) As the Ninth Circuit explained it: "The jurisdiction of the Adjustment Board is not limited to disputes arising from provisions specifically included in a collective bargaining agreement. If the claim is founded upon some incident of the employment relationship, or an asserted one, the Board may determine *the meaning and effect of the provisions of the collective agreement* with reference either to an included or to an omitted case." (*Railway Labor Executives Ass'n* v. *Atchison, T. & S. F. Ry. Co.* (9th Cir. 1970) 430 F.2d 994, 996, emphasis added, cert. den. 400 U.S. 1021; see *Consolidated Rail* v. *Labor Executives, supra,* 491 U.S. at p. —— [105 L.Ed. 2d at p. 260] [drug testing as part of railroad's policy of requiring periodic physical examinations as implied term of collective bargaining agreement].)

As a nonunion employee, Luck is not automatically subject to a collective bargaining agreement. Her case turns on state law, not on the application or interpretation of a collective bargaining agreement. (See *Mungo* v. *UTA French Airlines, supra,* 166 Cal.App.3d at p. 331 [no basis for federal jurisdiction without allegation of

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of petitioner's right, if any, not to be wrongfully terminated]; *Rader* v. *United Transp. Union* (11th Cir. 1983) 718 F.2d 1012, 1012-1013 [plaintiff alleges breach of collective bargaining agreement]; *Thomas* v. *New York, Chicago & St. Louis R. Co., supra,* 185 F.2d at pp. 615-617 [Adjustment Board applied collective bargaining agreement to nonunion employee]) and the facts presented in this case are so cursory, we assume that such an agreement was at issue in *Womble,* making this case distinguishable.

In its letter brief, Southern Pacific also cites a 1989 case in which a dispute over urinalysis was held to be subject to arbitration under the RLA. Again, this case is distinguishable from Luck's case because the dispute involved an implied term of the collective bargaining agreement. (See *Consolidated Rail* v. *Labor Executives, supra,* 491 U.S. at p. — [105 L.Ed.2d at p. 260].)

violation of federal law]; see also *Lingle* v. *Norge Division, Magic Chef* (1988) 486 U.S. ——, ——-——, —— [100 L.Ed.2d 410, 419-421, 423] [unanimous decision; state law issue is preempted by federal Labor Management Relations Act only if its determination requires interpretation of collective bargaining agreement].)[6] California's exercise of jurisdiction would not frustrate effective implementation of the RLA. (See *Mungo* v. *UTA French Airlines, supra,* at p. 331.) Thus, the RLA does not preempt Luck's claim and the trial court properly exercised jurisdiction over her case.

III. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. *No Tort Cause of Action*

Next, Southern Pacific argues that the issue of breach of good faith and fair dealing should have been decided as a matter of law—that the issue should never have been submitted to the jury. Its motion for directed verdict on this ground was denied. In essence, the railroad contends that Luck did not state a cause of action for breach of covenant of good faith and fair dealing—that it committed no bad faith act that could support such a theory of recovery.

A covenant of good faith and fair dealing is implied in every contract. (*Foley* v. *Interactive Data Corp.* (1988)

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[6] In its reply brief, Southern Pacific cites three cases in which federal courts have rejected the application of *Lingle*'s holding to drug testing when the plaintiffs alleged a violation of a right to privacy under state law. However, each of these cases is distinguishable from *Lingle* and from our case because resolution of the underlying issue in each case depended on interpretation of a collective bargaining agreement. (See *Laws* v. *Calmat* (9th Cir. 1988) 852 F.2d 430, 431; *Utility Workers of America* v. *Southern Cal. Edison* (9th Cir. 1988) 852 F.2d 1083, 1085-1086, cert. den. —— U.S. —— [109 S.Ct. 1530]; see also *Jackson* v. *Liquid Carbonic Corp.* (1st Cir. 1988) 863 F.2d 111, 114-115, cert. den. —— U.S. —— [109 S.Ct. 3158].)

47 Cal.3d 654, 683; see *Zurn Engineers* v. *State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App. 3d 798, 833, cert. den. 434 U.S. 985.) This covenant developed in the contract arena and is aimed at making effective a contract's promises. (*Foley* v. *Interactive Data Corp.*, *supra*, at p. 683.) An alleged breach of the implied covenant of good faith and fair dealing is an allegation of breach of contract and arises out of the contract itself. (*Id.*, at p. 690.) In an employment contract, the breach of this covenant gives rise to contract damages only; tort remedies are not available. (*Id.*, at pp. 696, 700; see *Newman* v. *Emerson Radio Corp.* (1989) 48 Cal.3d 973, 975-976.)[7] Therefore, the jury's award of compensatory damages cannot be upheld on the basis of a tortious breach of the implied covenant of good faith and fair dealing.

B. *Cause of Action in Contract*

A determination of whether the cause of action was properly submitted to the jury on a contract theory is a more complicated question. In general, Luck contends that Southern Pacific's act of terminating her for exercising her state constitutional right of privacy by refusing to submit to urinalysis constituted termination without good cause, and was therefore in bad faith. (See Cal. Const., art. I, § 1.) Southern Pacific counters that it had the right to terminate Luck without good cause but that if good cause was required, her refusal to submit to urinalysis constituted good cause.

1. *Underlying Contract*

First, Southern Pacific contends that there was no contract from which to imply a covenant of good faith and fair dealing. The employer argues that Luck was an

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[7] *Foley* v. *Interactive Data Corp.*, *supra*, is fully retroactive, applying to all cases not final as of its final date, January 30, 1989. (*Newman* v. *Emerson Radio Corp.*, *supra*, 48 Cal.3d at pp. 976, 993.) This is such a case.

"at will" employee who could be terminated without good cause and that, therefore, the cause of action for breach of the implied covenant of good faith and fair dealing should never have gone to the jury. The jury was instructed that in order to find a breach of the implied covenant of good faith and fair dealing, it must first find that an underlying contract of employment existed. The jury found that the employer breached the covenant. While the jury issued a special verdict, its verdict on whether there was a breach of the covenant was a general one. A general verdict implies a finding in favor of every fact essential to support it. (*Plyer* v. *Pacific etc. Cement Co.* (1907) 152 Cal. 125, 130; see 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 319, p. 320.) Therefore, the jury impliedly found that a contract existed.

On appeal, Southern Pacific argues that the breach of covenant issue should never have gone to the jury because the question of whether a contract existed is a question of law, not one of fact.[8] Under Labor Code section 2922,

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[8] Luck argues that any error in submitting this cause of action was invited when Southern Pacific agreed to submit it to the jury. A review of the record leads us to conclude otherwise. Southern Pacific's motion for directed verdict urged that Luck had not established a breach of the implied covenant of good faith and fair dealing. This motion was filed with the trial court's clerk the same day that the case was submitted to the jury. As submission occurred late in the afternoon, we assume that the motion was filed before the case went to the jury. The motion was denied, as were later motions for judgment notwithstanding the verdict and for new trial raising the same argument.

Luck makes much of the fact that Southern Pacific's motion for nonsuit at the close of Luck's case-in-chief did not include a challenge to the implied covenant cause of action. In fact, the employer, when questioned by the court on this omission in chambers, indicated that it thought that this cause of action should go to the jury on a factual issue. Apparently, it abandoned this position later in the trial, after it had presented its case. In light of the employer's otherwise consistent arguments that Luck had not stated a cause of action for breach of the implied covenant, we do not find this an appropriate case in which to apply the invited error doctrine.

an employment for an unspecified term may be terminated at the will of either party. However, the absence of an express written or oral contract term concerning termination of employment does not necessarily indicate that employment is actually intended by the parties to be "at will" pursuant to Labor Code section 2922, because the presumption of at-will employment may be rebutted by evidence of contrary intent. Generally, courts seek to enforce the actual understanding of the parties to a contract, and in so doing may inquire into the parties' conduct to determine if it demonstrates an implied contract. It must be determined, as a question of fact, whether the parties acted in such a manner as to provide the necessary foundation for an implied contract. (*Foley* v. *Interactive Data Corp., supra*, 47 Cal.3d at pp. 677, 680.)

The presumption of at-will employment may be overcome by evidence of an implied agreement that the employment would continue indefinitely, pending occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination. A number of factors are considered when ascertaining the existence and content of an employment agreement: consideration, any express contract terms, the employer's personnel policies and practices, the employee's longevity of service, the employer's actions or communications reflecting assurances of continued employment, and industry practices. (See *Foley* v. *Interactive Data Corp., supra*, 47 Cal.3d at pp. 677, 680.)

The determination whether an implied contract not terminate except for good cause exists is an issue of fact. (*Foley* v. *Interactive Data Corp., supra*, 47 Cal.3d at p. 677.) In Luck's case, there was sufficient evidence from which to conclude that such an implied contract existed. Luck had been employed by Southern Pacific for almost six and a half years at the time of termination. This length of service is sufficient for conduct to

occur on which a finding of the existence of an implied contract not terminate for other than good cause may be based. (See *id.*, at p. 681 [plaintiff employed for six yeas, nine months pleaded implied contract].) Luck was promoted to a nonunion position after two years. She received grade and salary increases and was repeatedly complimented on the high quality of her work during her term of employment. These factors contribute to a reasonable expectation that she would not be terminated except for good cause. (See *ibid.* [plaintiff pleaded facts sufficient for jury to find implied-in-fact contract].) Therefore, the jury's implied finding that a contract existed is supported by substantial evidence. (See *id.*, at p. 682). As the statutory presumption that Luck was an at-will employee was overcome by evidence of an implied contract, Southern Pacific was required to show good cause for her termination.

2. *Bad Faith—Exercise of Privacy Right*

a. *Privacy Interests*

Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." By this provision, California accords privacy the constitutional status of an inalienable right, on a par with defending life and possessing property. (*Vinson* v. *Superior Court* (1987) 43 Cal.3d 833, 841 [limiting right to discover one's sexual history, habits and practices in action for sexual harassment and emotional distress].) The validity of the jury's finding of bad faith turns on whether Luck had a constitutional right to privacy allowing her to refuse to submit to urinalysis.

Division Three of this District has recently held that the collection and testing of urine intrudes upon reasonable expectations of privacy. (*Wilkinson* v. *Times Mirror Corporation* (1989) 215 Cal.App.3d 1034, 1048, petn. for review pending in Cal. Supreme Court.) This finding is consistent with that of the United States Supreme Court, which held that both the collection of a urine sample and its testing involve privacy interests and therefore constitute searches within the meaning of the Fourth Amendment. The "chemical analysis of urine . . . can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated: [¶] 'There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.' [Citation.] [¶] [I]t is clear that *the collection and testing* of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . ." (*Skinner* v. *Railway Labor Exec. Assn.* (1989) 489 U.S. ——, ——-—— [103 L.Ed.2d 639, 659-660], emphasis added; see *Harmon* v. *Thornburgh* (D.C. Cir. 1989) 878 F.2d 484, 487, cert. den. *sub nom.*, *Bell* v. *Thornburgh*, —— U.S. —— [58 U.S.L.W. 3466-3467]; *Wilkinson* v. *Times Mirror Corporation*, *supra*, 215 Cal.App.3d at p. 1044.)[9] The California Supreme Court has also held that

[9] "Urinalysis [is a] search[]. [Citations.] [It] compromise[s] legitimate expectations of privacy in two distinct ways. [First,] [t]he taking of the [urine sample] intrudes physically upon the integrity of one's body and its functions. [Citations.] Although it is a waste product, urine is discharged privately. A reasonable person would not expect '. . . members of the public' to [inspect] one's

the taking of a urine sample invokes "privacy and dignitary interests protected by the due process and search and seizure clauses." (*People* v. *Melton* (1988) 44 Cal.3d 713, 739, fn. 7, cert. den. —— U.S. —— [109 S.Ct. 329].) Therefore, we are satisfied that urinalysis intrudes upon reasonable expectations of privacy. (See *Wilkinson* v. *Times Mirror Corporation*, *supra*, at p. 1048.)

Nevertheless, Southern Pacific contends that the state constitutional right to privacy (Cal. Const., art. I, § 1) does not apply to urinalysis. The constitutional amendment adopted in 1972 made explicit the right to privacy. (*White* v. *Davis* (1975) 13 Cal.3d 757, 773; see *Alarcon* v. *Murphy* (1988) 201 Cal.App.3d 1, 5.) The "principal 'mischiefs' " at which the constitutional amendment was directed were the uncontrolled collection and use of personal information by government and business. (*Robbins* v. *Superior Court* (1985) 38 Cal.3d 199, 212-213; *White* v. *Davis*, *supra*, at p. 775.) Southern Pacific contends that the informational protection described in *White* is the only protection that article I, section 1 provides.[10] "However, the right to privacy has been held to protect a diverse range of personal freedoms." (*Robbins* v. *Superior Court*, *supra*, at p. 213; *White* v. *Davis*, *supra*, at pp. 773-774, 774, fn. 10; see, e.g., *Committee to Defend Reproductive Rights* v. *Myers* (1981) 29 Cal.3d 252, 262 [right of procreative choice]; *Bouvia* v. *Superior Court* (1986) 179 Cal.App.3d 1127, 1137 [right to refuse medical treatment].) The "constitutional right of

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urine . . . . [Citations.] Second, [the] analysis . . . exposes to the government and public private facts about one's life." (*Amalgamated Transit U.* v. *Cambria Cty. Tr. Auth.* (W.D. Pa. 1988) 691 F.Supp. 898, 902.)

[10] Southern Pacific's argument assumes that Luck has no right to informational privacy involved in urinalysis. As the *testing* of urine to determine the presence of drugs constitutes a search for information, the validity of this assumption is suspect. However, we address the merits of the claim.

privacy guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity." (*Bartling* v. *Superior Court* (1984) 163 Cal.App.3d 186, 195 [right to refuse medical treatment].)

Before 1972, California courts had found a state and federal constitutional right to privacy even though such a right was not enumerated in either constitution, and had consistently given a broad reading to the right to privacy. (*Central Valley Chap. 7th Step Foundation* v. *Younger* (1979) 95 Cal.App.3d 212, 234; see *People* v. *Porras* (1979) 99 Cal.App.3d 874, 879.) The elevation of the right of privacy to constitutional stature was intended to expand, not contract, privacy rights. (*Porten* v. *University of San Francisco* (1976) 64 Cal.App.3d 825, 829; see *People* v. *Porras*, *supra*, at p. 879.) The Supreme Sourt has held that polygraph examinations inherently intrude on an employee's right to privacy under article I, section 1. (*Long Beach City Employees Assn.* v. *City of Long Beach* (1986) 41 Cal.3d 937, 943-948.) As freedom from polygraph examination is a protected privacy interest, it seems reasonable to infer that our Supreme Court, like the United States Supreme Court in the Fourth Amendment context, would find both the collection and testing of urine to be privacy interests protected by article I, section 1.

b. *Private Employer*

Next, Southern Pacific argues that, as a private employer, it was not required to observe the privacy guarantee of article I, section 1.[11] The trial court denied its

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[11] This argument is raised for the first time in Southern Pacific's reply brief; its opening brief assumed that the right to privacy could be asserted against a private employer. Normally, we do not address new issues raised for the first time in a reply brief on fairness grounds, as this deprives the respondent of an opportunity to respond to the new claims. (*Smith* v. *Board of Medical Quality Assurance* (1988) 202 Cal.App.3d 316, 329, fn. 5 [right to pri-

motion for directed verdict, urged on the ground that the constitutional right to privacy did not prohibit a private employer's invasions of privacy. Article I, section 1 of the California Constitution does not specify whether its privacy provisions are limited to state action. However, Division Three of this District has recently held in a urinalysis case that article I, section 1 was intended to reach both governmental and nongovernmental conduct. (*Wilkinson* v. *Times Mirror Corporation, supra*, 215 Cal. App.3d at pp. 1041-1043.) This finding is consistent with previous case law. Those cases held that the principal aim of the constitutional provision was to limit the infringement on personal privacy arising from government activity. (*White* v. *Davis, supra*, 13 Cal.3d at p. 761.) However, the California Supreme Court has assumed that it limits business as well as government activity, based on an analysis of the ballot arguments in support of the privacy amendment. (*Id.*, at p. 774; see *Wilkinson* v. *Times Mirror Corporation, supra*, at p. 1040.) Appellate courts have repeatedly held that the right to privacy is an inalienable right which no one may violate. (*Wilkinson* v. *Times Mirror Corporation, supra*, at pp. 1041-1043 [private potential employer]; *Porten* v. *University of San Francisco, supra*, 64 Cal.App.3d at p. 829 [private university]; see *Semore* v. *Pool* (Feb. 2, 1990, E006138) —— Cal.App.3d ——, ——-—— [typed opn. pp. 4-6] [private employer; allegation of state action not

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vacy].) However, Luck has had the opportunity to respond by letter brief. Also, Southern Pacific's analysis of *Schmidt* v. *Superior Court* (1989) 48 Cal.3d 370, could not have been made earlier, as that decision had not been announced at the time that the opening brief was filed in 1988.

Southern Pacific did not raise this contention at trial, either. However, a party may advance a new theory on appeal when the issue is a question of law based on undisputed facts and involves an important question of public policy. (*Fisher* v. *City of Berkeley* (1984) 37 Cal.3d 644, 654-655, fn. 3, affd. (1986) 475 U.S. 260.) Given the importance of the issue in this case, we find it appropriate for us to resolve its merits.

required to overcome demurrer to cause of action based on constitutional right to privacy]; *Laguna Publishing Co.* v. *Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 851 [dicta], app. dism. 459 U.S. 1192; *Kinsey* v. *Macur* (1980) 107 Cal.App.3d 265, 272 [individual]; see also *Annenberg* v. *Southern Cal. Dist. Council of Laborers* (1974) 38 Cal.App.3d 637, 645-646 [labor union].) Commentators have also espoused this view. (See, e.g. Note, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?* (1986) 19 Loyola L.A. L.Rev. 1451, 1482-1483; see also Comment, *Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights?* (1988) 16 Pepperdine L.Rev. 45, 58, fn. 129; Decker, Employee Privacy Law and Practice (1987) §§ 3.10-3.11, 7.9, pp. 130-132, 292.)

Southern Pacific argues that the California Supreme Court has recently suggested that article I, section 1 does not bar private action. In *Schmidt* v. *Superior Court, supra,* 48 Cal.3d 370, the high court ruled that statutes permitting age restrictions to be placed on mobile home park residency were not unconstitutional on familial privacy or equal protection grounds. (*Id.*, at pp. 389-390.) The court added a footnote: "In this regard, plaintiffs rely on a number of lower court cases which—in quite distinct factual contexts—have found that the state constitutional privacy provision applies to private as well as to state conduct. (See, e.g., *Porten* v. *University of San Francisco* (1976) 64 Cal.App.3d 825 [134 Cal.Rptr. 839] [private university's alleged dissemination of information from student application for unauthorized purposes]; *Chico Fem. Women's Hlth. Cr.* v. *Butte Glenn Med. S.* (E.D. Cal. 1983) 557 F.Supp. 1190 [private medical association's alleged interference with health center patients' exercise of reproductive rights].) Because we conclude that the rule at issue here would not be unconstitutional even if the state action requirement were met, we have no occasion in this case to consider under

what circumstances, if any, purely private action by a property owner or landlord would constitute a violation of the state constitutional privacy provision." (*Id.*, at p. 389, fn. 14.)

We are not persuaded that this footnote alters the existing law of this state, for several reasons. First, the privacy issue presented in *Schmidt*—whether an age restriction in a mobile home park infringes on a privacy right—is, as that court stated, factually distinguishable from that presented in *Porten* and *Chico*—in which the privacy interests at stake were informational and substantive, respectively. Luck's privacy interests were also substantive and informational, and thus more akin to those in *Porten* and *Chico* than in that presented in *Schmidt*. Put another way, the interests at stake in *Schmidt* were property interests which might not be found to come within the privacy protection, regardless of who violated them; those at stake in *Porten*, *Chico*, and in Luck's case are more personal, involving what lay persons believe come within a zone of privacy. Second, the footnote itself is inconclusive—the high court expressly declined to rule on the question of whether private action would constitute a violation of privacy. Such references are tentative at best and, if anything, highlight the fact that the question remains to be decided by that court. (*Newman* v. *Emerson Radio Corp.*, *supra*, 48 Cal.3d 973, 988.) Third, even if the footnote means what Southern Pacific suggests that it does, it is dicta. Fourth, the ballot argument supporting the adoption of the privacy amendment expressly states that it was intended to apply to prevent government and business violations of privacy. (See *White* v. *Davis*, *supra*, 13 Cal.3d at pp. 774-775; see *Roberts* v. *Gulf Oil Corp.* (1983) 147 Cal.App.3d 770, 770, 791-793, fn. 15.) *Schmidt* provides us too slim a basis to ignore the accepted principle of existing law that the right to privacy limits private as well as state action. (See, e.g., *Semore* v. *Pool*, *supra*, —— Cal.App.3d at pp.

——-—— [typed opn. pp. 5-6] [*Schmidt* has not decided this issue].) Therefore, we find that a private employer is bound by the terms of the privacy provisions of article I, section 1. (*Wilkinson* v. *Times Mirror Corporation*, *supra*, 215 Cal.App.3d at pp. 1041-1043 [private employer]; *Porten* v. *University of San Francisco*, *supra*, 64 Cal.App.3d at p. 829 [private university].)[12]

c. *Public Interests*

Next, Southern Pacific contends that even if the right to privacy prohibits employee urinalysis, such testing was justified under the facts of this case. The constitutional right to privacy does not prohibit all incursion into individual privacy, but provides that any such intervention must be justified by a compelling interest. (*White* v. *Davis*, *supra*, 13 Cal.3d at p. 775; *Alarcon* v. *Murphy*, *supra*, 201 Cal.App.3d at p. 5; see *Long Beach City Employees Assn.* v. *City of Long Beach*, *supra*, 41 Cal.3d at p. 948. This test places a heavier burden on Southern Pacific than would a Fourth Amendment privacy analysis, in which the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. (Compare *Skinner* v. *Railway Labor Exec. Assn.*, *supra*, 489 U.S. at p. —

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[12] Luck also argues that, regardless of whether state action is required, Southern Pacific is not a private employer because the railroad industry is heavily regulated by the federal government. While there is extensive governmental regulation of the railroad industry in general and Southern Pacific in particular, this argument does not persuade us. Luck's position was not regulated, nor was the urinalysis required by or conducted in accordance with any federal regulations that apply to her. (Compare *Skinner* v. *Railway Labor Exec. Assn.*, *supra*, 489 U.S. at pp. ——, —— [103 L.Ed.2d at pp. 653-656, 661-663] [operating employees working on or around rail rolling stock came within Federal Railroad Administration regulations].) Therefore, for purposes of Luck's cause of action for damages against her employer, Southern Pacific is more akin to a private employer than to a public employer.

[103 L.Ed.2d at p. 661]; *Treasury Employees* v. *Van Raab* (1989) 489 U.S. ——, —— [103 L.Ed.2d 685, 702]; *White* v. *Davis, supra,* 13 Cal.3d at p. 775).[13] Although Southern Pacific urges us to use the Fourth Amendment test, we see no reason to depart from existing precedent applying the compelling interest test in cases arising under article I, section 1 of the state Constitution.[14]

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[13] Southern Pacific suggests that the recent United States Supreme Court cases are not applicable, because Luck's case involves random testing and the federal cases do not. Faced with a similar suggestion challenging the application of *Skinner* and *Von Raab* to a random urinalysis test, a federal court of appeal has held that, while the random nature of urinalysis testing is a relevant consideration, it does not require a fundamentally different analysis from that taken by the Supreme Court. (*National Federation of Federal Employees* v. *Cheney* (D.C. Cir. 1989) 884 F.2d 603, 608-609, cert. den. —— U.S. ——; see *American Federation of Gov. Employees* v. *Skinner* (D.C. Cir. 1989) 885 F.2d 884, 891.) In like manner, we are satisfied that the United States Supreme Court cases and their progeny are persuasive authority in Luck's case, although we recognize the different balancing test used pursuant to article I, section 1, as opposed to the Fourth Amendment analysis used in federal cases.

[14] Division Three has held that justification by a compelling interest is not required if the right to privacy is not substantially burdened or affected by the intrusion. (*Wilkinson* v. *Times Mirror Corporation, supra,* 215 Cal.App.3d at p. 1047.) In that case, the court applied a reasonableness test, rather than the compelling interest test, to a case involving a job applicant who was required to submit to urinalysis as a condition of an offer of employment from a private employer. However, *Wilkinson* noted that its plaintiffs were applicants for employment rather than existing employees, and that it did not consider the issues presented in Luck's case—"the constitutionality of a private employer's drug testing of its employees, or the effect of a private employee's consent to drug testing under the threat of loss of employment." (*Id.,* at pp. 1048, 1050, fn. 9.) As Luck was a Southern Pacific employee, rather than a job applicant, we are satisfied that the termination of her employment was a sufficient burden on her right to privacy to merit application of the compelling interest test. (See, e.g., Decker, Employee Privacy Law and Practice (1987) § 7.9, p. 300 [employers have greater latitude with job applicants than with employees].)

Having determined that the compelling interest test applies, we must next determine what, if any, compelling interests Southern Pacific established that could be balanced against Luck's privacy interest. (See *White* v. *Davis*, *supra*, 13 Cal.3d at p. 775.) At trial and on appeal, Southern Pacific argued that its interest in safety justified the invasion of Luck's privacy interest. From 1981 until her 1985 termination, Luck worked at a computer terminal each day. She wore no safety equipment; high heels and a dress were her normal attire. Her job called for her to travel in order to install computers at other sides. Luck testified that in her last four years as a computer operator with Southern Pacific, she had nothing to do with the actual operation of trains and no responsibility for the operation of railroad equipment. A Southern Pacific official testified that at the time of her termination, Luck had no public safety duties.

The trial court found that the testing program, as applied to all exempt (nonunion) Southern Pacific employees, did not necessarily violate the employees' right to privacy without justification. It determined, as a matter of law, that there was a compelling public interest in rail safety and that testing was justified in the railroad industry because of its drug-related problems, but that the jury should determine whether it was necessary to require Luck to submit to urinalysis in order to promote safety. The jury found this was not necessary, impliedly finding that Luck did not hold a safety position. After the verdict was returned, the trial court noted that if its decision to submit this issue to the jury was erroneous—if it presented an issue of law rather than one of fact—it found as a matter of law that "requiring the plaintiff to produce a sample as a condition of employment, given her particular job obligations and duties" was a violation of public policy. Implied in this ruling is the trial court's finding that, as a matter of law, Southern Pacific did not have a sufficient interest in railroad safety to justify the

intrusion into Luck's privacy interest represented by urinalysis.

Was Luck a safety employee? No court has determined whether this question presents an issue of law or of fact. When, as here, there is no factual dispute about the nature of the employee's work—only whether that work was safety-related—the issue seems to be one of law for the court. Although the court therefore erred by submitting this issue to the jury, the error was harmless. The trial court's ruling was consistent with the jury's verdict that Luck was not a safety employee, making that verdict merely advisory.

Next, we must determine whether, as a matter of law, Luck was a safety employee. Again, we have no case law addressing this specific issue. However, federal courts considering safety issues in Fourth Amendment privacy cases provide persuasive authority. The government's interest in regulating the conduct of railroad employees to ensure safety presents special needs beyond normal law enforcement that may justify urinalysis under the Fourth Amendment. (See *Skinner* v. *Railway Labor Exec. Assn.*, *supra*, 489 U.S. at pp. ——-——, —— [103 L.E.2d at pp. 661-662, 668] [railroad employees involved in train movements and operations, or maintenance and repair of signal systems; operators recently involved in railway accident].) However, Luck is not a railroad operating employee working on or around rail rolling stock. (See *id.*, at p. 653 [upholding drug-testing regulations applying to railroad employees subject to the federal Hours of Service Act (45 U.S.C. § 61, subd. (b)(2)), defined as those actually engaged in or connected with the movement of any train].) Her work is not akin to that of persons who have routine access to dangerous nuclear power facilities, nor of a customs official directly involved in drug interdiction, nor of an employee required to carry a firearm. (See *Skinner* v. *Railway Labor Exec. Assn.*, *supra*, at p. — [103 L.Ed.2d at p. 667]; *Treasury*

Employees v. *Von Raab, supra,* 489 U.S. at p. — [103 L.Ed. 2d at p. 709].)[15]

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[15] For example, in the Fourth Amendment context, federal courts have upheld urinalysis testing of air traffic controllers, pilots, aviation mechanics, and flight attendants; drug counselors; Army-employed civilian police and guards (*National Federation of Federal Employees* v. *Cheney, supra,* 884 F.2d at pp. 610-615); civilian employees of chemical weapons plant who have access to areas in which experiments are performed (*Thomson* v. *Marsh* (4th Cir. 1989) 884 F.2d 113, 114-115); drivers of and attendants on school buses for handicapped children (*Jones* v. *Jenkins* (D.C. Cir. 1989) 878 F.2d 1476, 1477); employees holding top secret national security clearance (*Harmon* v. *Thornburgh, supra,* 878 F.2d at pp. 491-492); railway and highway safety inspectors; lock and dam operators; vessel traffic controllers; hazardous material inspectors; aircraft mechanics; motor vehicle operators holding security clearances (*American Federation of Gov. Employees* v. *Skinner, supra,* 885 F.2d at pp. 890-893); county correctional employees with regular access to prisoners and weapons (*Taylor* v. *O'Grady* (7th Cir. 1989) 888 F.2d 1189, 1139, 1201); and sworn and civilian police personnel who carry firearms or participate in drug interdiction efforts (*Guiney* v. *Roache* (1st Cir. 1989) 873 F.2d 1557, 1558, U.S. app. pending). These courts have found insufficient governmental interests to uphold urinalysis testing of criminal prosecutors and Justice Department employees with access to grand jury proceedings (*Harmon* v. *Thornburgh, supra,* at pp. 490-492), and county correctional employees who have no reasonable opportunity to smuggle narcotics to prisoners (*Taylor* v. *O'Grady, supra,* at pp. 1199, 1201). Federal courts have questioned the propriety of random testing of secretaries, engineering technicians, research biologists, and animal caretakers who work at chemical and nuclear surety facilities (*National Federation of Federal Employees* v. *Cheney, supra,* at pp. 611-612 [remand for further proceedings]; civilian lab technicians at Army drug-testing laboratories and employees in the chain of custody of biochemical testing (*id.,* at p. 614 [clear, direct nexus between employee duties and nature of feared harm, and compelling reason to expect drug use will result in misplaced sympathies for responsibilities required]); and police department personnel who do not carry firearms or participate in drug interdiction efforts. (*Guiney* v. *Roache, supra,* at p. 1558 [remand].) These courts have not yet determined whether categories of persons who handle classified material may be overly inclusive. (See *Treasury Employees* v. *Von Raab, supra,* 489 U.S. at pp. — - — [103 L.Ed.2d at pp. 709-710];

In determining the existence of a safety interest, federal courts distinguish between unsupervised employees who work in the field and employees who work in a traditional office environment where drug use may be more easily detected. (See *National Federation of Federal Employees* v. *Cheney*, *supra*, 884 F.2d at p. 614; see *Treasury Employees* v. *Von Raab*, *supra*, 489 U.S. at p. — [103 L.Ed.2d at p. 707]; see also *American Federation of Gov. Employees* v. *Skinner*, *supra*, 885 F.2d at p. 893; *Harmon* v. *Thornburgh*, *supra*, 878 F.2d at pp. 491-492.) To paraphrase a recent federal court decision prohibiting drug testing of Justice Department office workers, a blunder by a computer operator in a railroad's engineering department may lead, through a chain of ensuing circumstances, to a threat to public safety. However, that sort of indirect risk is "wholly different from the risk posed by a worker who carries a gun or operates a train." The safety rationale adopted by the Supreme Court in *Skinner* and *Von Raab* focused on the immediacy of the threat. The point was that "a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee . . . will have no chance to recognize and rectify [a] mistake, nor will other . . . personnel have an opportunity to intervene before the harm occurs." (*Harmon* v. *Thornburgh*, *supra*, 878 F.2d at p. 491.) *Skinner* and *Von Raab* provide no basis for finding that an office employee constitutes a safety risk when the chain of causation between misconduct and injury is greatly attenuated.

While railroads clearly have an interest in the safe operation of their trains, it is not clear that testing Luck furthered this interest. When an employer asserts an interest that is not obviously applicable to the specific employee in question, federal decisions applying *Skinner* and *Von Raab* have held that testing cannot be upheld absent

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National Treasury Employees Union v. *Von Raab* (5th Cir. 1989) 876 F.2d 376, 376 [remand to district court].)

a clear, direct nexus between the employee's duties and the nature of the feared harm. (See *National Federation of Federal Employees* v. *Cheney*, *supra*, 884 F.2d at p. 614; *Harmon* v. *Thornburgh*, *supra*, 878 F.2d at p. 490.) Here, Southern Pacific suggested only indirect, potential safety ramifications that might result from an imprudent decision that an employee working as Luck did might make if her judgment were impaired by drugs. Under the federal authorities, Luck's job did not have sufficient safety aspects to constitute a safety interest that might be balanced against the intrusion upon her privacy rights. When we also consider that the interest must be compelling in order to justify an intrusion of her privacy rights under our state Constitution—a higher showing than would be required under the Fourth Amendment analysis used by federal courts—it is clear that the trial court's implied ruling that Southern Pacific's safety interest did not justify the invasion of Luck's privacy was correct.

Southern Pacific also contends that other, non-safety interests justified the testing: deterrence, efficiency, competence, creating a drug-free environment, enforcing rules against drug use, and ensuring public confidence in the integrity of the railroad industry. The trial court ruled that these interests were not compelling. On appeal, the employer contends that the trial court erred in precluding it from presenting these other interests to the jury.

In a railroad context, proper drug-testing regulations have been justified by the goal of preventing railroad operation accidents and casualties resulting from drug impairment. (*Skinner* v. *Railway Labor Exec. Assn.*, *supra*, 489 U.S. at p. — [103 L.Ed.2d at p. 662].) As Southern Pacific points out, safety is not the only possible employer interest that might be placed on the scale to balance against the employee's privacy right in order to determine whether urinalysis was justified. (See *Treasury Employees* v. *Von Raab*, *supra*, 489 U.S. at p. — [103 L.Ed.2d at p. 702] [Customs Service testing to deter

drug use among those eligible for promotion to sensitive positions and to prevent the promotion of drug users to those positions promote substantial governmental interest]; *National Federation of Federal Employees* v. *Cheney*, *supra*, 884 F.2d at pp. 614-615 [drug counselors may be tested to ensure their allegiance to their "mission"].) However, the trial court correctly ruled that none of the non-safety interests asserted at trial are compelling. Even under the lower federal standard, workers may not be compelled to submit to urinalysis unless "a clear, direct nexus exists between the nature of the employees's duty and the nature of the feared violation." (*Harmon* v. *Thornburgh*, *supra*, 878 F.2d at p. 490.) Southern Pacific has not articulated any clear, direct nexus in relation to any of the interests it suggests justify the testing. If these interests are not justifiable under the less stringent Fourth Amendment test, a fortiori, they cannot constitute compelling interests under article I, section 1 of the California Constitution. (See *Central Valley Chap. 7th Step Foundation* v. *Younger*, *supra*, 95 Cal.App.3d 212, 238 [administrative burden was not compelling state interest]; see also *Harmon* v. *Thornburgh*, *supra*, at pp. 490-491 [maintaining work force integrity does not justify urinalysis testing of federal prosecutors or workers with access to grand jury proceedings].) The trial court correctly ruled that Southern Pacific's other proffered justifications were not compelling. As Southern Pacific did not establish any compelling interest that might justify an intrusion of Luck's privacy rights, that intrusion was unjustified.[16]

d. *Consent*

Southern Pacific also contends that Luck expressly consented to the testing. In 1979, she agreed to take a

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[16] In light of this holding, we need not address the question of whether the means chosen to achieve a compelling interest must be the least intrusive means, nor need we consider what effect—if any—the use of random testing rather than trigger testing would have on the weighing process.

physical examination at the time that she was hired, including a test for detection of narcotic drug usage. She signed a consent form, agreeing to let Southern Pacific doctors examine her as "often as the company may deem necessary." Luck testified that she interpreted the release form to mean that she permitted her new employer could determine if she was initially able to perform her job duties; if Southern Pacific noticed a problem that would make her unable to perform her job, she would permit a doctor to check that further. No one at Southern Pacific advised her that by signing the consent to the entry physical that she was consenting to any and all future tests that her employer might deem necessary. When it instructed Luck to submit to urinalysis in 1985, Southern Pacific required its employees to sign a separate consent form. The trial court found the preemployment consent form to be ambiguous when denying Southern Pacific's motion for nonsuit urged on the basis of consent. Motions for directed verdict and for new trial were also denied on similar grounds.

We agree with the trial court that the language of the contract is ambiguous about whether Luck's consent applied after the preemployment physical examination process was complete. The jury was instructed on the issue of consent. By its verdict in Luck's favor, the jury impliedly found that she did not consent to urinalysis. (See *Plyer* v. *Pacific etc. Cement Co.*, *supra*, 152 Cal. 125, 130; see also 7 Witkin, Cal. Procedure, *supra*, § 319, p. 320.) Waiver of a contractual right is ordinarily a question of fact. As Luck's testimony constituted substantial evidence to support the finding of lack of consent, we are bound on appeal by this determination. (See *Rubin* v. *Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292, 298.)

Southern Pacific also suggests that Luck impliedly consented to urinalysis when she went to work in a regulated industry. This argument is based on the premise that all

railroad employees, even those who work in nonregulated positions, are regulated employees—a premise we have already rejected. While a regulated employee may have a reduced expectation of privacy (see *Skinner* v. *Railway Labor Exec. Assn.*, *supra*, 489 U.S. at p. —— [103 L.Ed. 2d at p. 666] [railroad operating employees]; *Treasury Employees* v. *Von Raab*, *supra*, 489 U.S. at p. —— [103 L.Ed.2d at p. 706] [drug interdiction officials; customs officials carrying firearms]), we have already determined that Luck was not employed in a regulated position. (See pt. c., *ante.*) Therefore, Luck did not impliedly consent to urinalysis by virtue of her railroad employment.

e. *Bad Faith*

Finally, Southern Pacific contends that it did not act in bad faith when it terminated Luck. In essence, the employer argues that even if Luck had a constitutional right to refuse to submit to urinalysis, it had an honest, good faith belief that it had good cause to terminate her in 1985. The reason for an employee's dismissal and whether that reason constitutes bad faith are evidentiary questions most properly resolved by the trier of fact. (*Khanna* v. *Microdata Corp.* (1985) 170 Cal.App.3d 250, 263; see 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 177, pp. 172-174.) The reason for Luck's dismissal is not disputed: Southern Pacific admitted that her termination was solely the result of her failure to submit to urinalysis. The jury was instructed that the neglect or refusal to fulfill a contractual obligation based on an honest, mistaken belief did not constitute a breach of the implied covenant. We must assume that the jury followed this instruction. (*People* v. *Bruce* (1989) 208 Cal.App.3d 1099, 1106.) The jury found that Luck's termination was in bad faith. On appeal, our inquiry is limited to whether there is substantial evidence in the record to support this finding of bad faith. (*Khanna* v. *Microdata Corp.*, *supra*, at p. 263.) Southern Pacific's invasion of Luck's privacy was

unjustified. (See pt. c., *ante.*) The jury impliedly found that Luck was terminated for exercising her constitutional right to privacy. There is substantial evidence to support the finding that Southern Pacific acted in bad faith when terminating Luck under these circumstances.[17]

f. *Conclusion*

The jury's verdict that Southern Pacific committed a contractual breach of its implied covenant of good faith and fair dealing by terminating Luck for refusing to submit to urinalysis was proper. This finding of liability supports the award of economic damages, although it cannot support an award of tort damages. (See *Foley* v. *Interactive Data Corp., supra,* 47 Cal.3d 654, 696, 700.)[18]

IV. VIOLATION OF PUBLIC POLICY

Southern Pacific challenges the trial court's decision to submit Luck's cause of action for wrongful termination in violation of public policy to the jury. The trial court denied Southern Pacific's motion for directed verdict, new trial, and judgment notwithstanding the pleadings challenging this cause of action and the jury's ulti-

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[17] Southern Pacific also argues that Luck did not establish bad faith resulting from a failure to grant her a pretermination hearing, nor any damage resulting from the lack of a hearing. (See *Rulon-Miller* v. *International Business Machines Corp.* (1984) 162 Cal.App.3d 241, 248 [fair dealing requires employer to give employee the benefit of rules and regulations adopted for employee's protection]; see 2 Witkin, Summary of Cal. Law, *supra,* § 176, pp. 171-172.) In light of our finding that the jury's finding of bad faith is upheld on another ground, we need not determine this issue.

[18] "The difficult and delicate task of balancing the privacy rights of job applicants and employees against the legitimate business and safety concerns of private employers involves policy determinations which are peculiarly within the purview of the Legislature, and we urge that body to recognize and act on its obligation to provide guidance in this much debated area." (*Wilkinson* v. *Times Mirror Corporation, supra,* 215 Cal.App.3d at p. 1052, fn. omitted.)

mate verdict on it. On appeal, Southern Pacific argues that Luck did not establish a case for wrongful termination.[19]

Since the time of trial, our Supreme Court has announced two major decisions on the field of wrongful termination. (See *Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d 654; see also *Newman* v. *Emerson Radio Corp.*, *supra*, 48 Cal.3d 973). These new cases reaffirm that an employer's right to terminate even an "at will" employee is subject to limits imposed by public policy, to prevent the threat of termination from resulting in actions taken which are harmful to the public. (*Foley* v. *Interactive Data Corp.*, *supra*, at p. 665; (see *Tameny* v. *Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172.) One who has been wrongfully terminated from employment may seek tort damages based on a claim that he or she was terminated in violation of a fundamental public policy. (*Newman* v. *Emerson Radio Corp.*, *supra*, at pp. 975-976; *Foley* v. *Interactive Data Corp.*, *supra*, at p. 666; *Tameny* v. *Atlantic Richfield Co.*, *supra*, at pp. 170, 174-176.) This tort is independent of the term of employment. (*Foley* v. *Interactive Data Corp.*, *supra*, at pp. 666-667, 693, fn. 30.)

Southern Pacific argues that the alleged privacy right at issue in Luck's case is personal to every Californian,

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[19] Most of Southern Pacific's contentions on this issue appear for the first time in its reply brief. These arguments did not appear in its November 1988 opening brief, filed a month before *Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d 654. Generally, issues cannot be raised for the first time on apply in a reply brief, as this deprives the respondent of an opportunity to respond to the new claims. (*Smith* v. *Board of Medical Quality Assurance*, *supra*, 202 Cal.App.3d at p. 329, fn. 5.) However, Luck addressed the *Foley* issues in her brief; the California Supreme Court has held *Foley* retroactive to cases such as this which are not yet final (see *Newman* v. *Emerson Radio Corp.*, *supra*, 48 Cal.3d at pp. 976, 993); and Southern Pacific presented its *Foley* argument in as timely a fashion as possible after *Foley* was announced. Therefore, we will address the issues.

and that its violation does not involve public policy, but merely her individual rights. (See Cal. Const., art. I, § 1.) The trial court denied Southern Pacific's motion for nonsuit on this ground. Luck claims that to fire her for exercising her constitutional right to privacy is against public policy. (See *Tameny* v. *Atlantic Richfield Co.*, *supra*, 27 Cal.3d at pp. 172-178.) The trial court agreed as a matter of law, although it permitted the issue to go to the jury. The jury also agreed that public policy rights had been violated.

No California appellate court has determined whether an employee's termination for refusal to submit to urinalysis as an exercise of one's constitutional right to privacy would constitute a violation of public policy for purposes of wrongful termination. However, the California Supreme Court has given us guidelines to apply to determine whether, on particular facts, a cause of action for wrongful termination in violation of a public policy might lie. A termination that is against public policy must affect a duty which inures to the benefit of the public at large rather than to a particular employer or employee. (*Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d at pp. 668-669.) Past cases recognizing a tort action for termination in violation of public policy seek to protect the public by protecting an employee who refused to commit a crime, reported criminal activity, or disclosed other illegal, unethical, or unsafe practices. (*Id.*, at p. 670.) However, even the reporting of improper conduct may not constitute a public policy interest if, for example, an employee's duty to disclose information to his employer serves only the employer's private interest, the public policy rationale does not apply. (*Id.*, at pp. 670-671 [no violation of public policy when employee terminated after reporting that co-worker was under criminal investigation].) The California Supreme Court explained that the absence of a distinctly public interest is apparent when we consider that if an employer and

employee expressly agreed that the employee had no obligation to, and should not, inform the employer of any adverse information the employee learned about a coworker's background, no public policy would render the agreement void. If the employer and employee could have lawfully made such an agreement, *Foley* reasoned, it cannot be said that the employer, by discharging an employee on this basis, violated a fundamental duty imposed on all employers for the protection of the public interest. (*Id.*, at pp. 670-671, fn. 12.)

Measured against the *Foley* standard, Luck did not state a cause of action for wrongful termination in violation of public policy. The right to privacy is, by its very name, a private right, not a public one. The parties could have lawfully agreed that Luck would submit to urinalysis without violating any public interest. Such an agreement between Luck and Southern Pacific would not have been against public policy. (See, e.g., *Consolidated Rail* v. *Labor Executives*, *supra*, 491 U.S. —— [105 L.Ed.2d 250] [no suggestion that drug testing would be improper term of collective bargaining agreement].) Therefore, under *Foley*, there was no violation of *public* policy.

Even if Luck's termination involved public policy interests, her attempt to state a cause of action for wrongful termination based on the violation of those policy interests would not satisfy other requirements set forth in *Foley*. According to the California Supreme Court, the public policy must be one about which reasonable persons can have little disagreement. (*Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 688.) This case is part of an explosion of hotly contested employee urinalysis cases which should dispel any notion that reasonable persons have evolved a consensus about whether urinalysis testing is consistent with state and federal privacy protections. Measured against this background, the issue of whether

urinalysis and privacy rights involve *public* policy interests is one about which reasonable people may, and do, differ.

Finally, the public policy must also be one that was firmly established at the time of termination. (*Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 668.) Southern Pacific argues that at the time it instituted its employee testing program in 1985, there was no firmly established policy prohibiting urinalysis. The employer raised this issue in the trial court before *Foley* was announced, but its motion for nonsuit—based, in part, on the ground that no public policy against urinalysis existed at the time of Luck's termination—was denied. The United States Supreme Court did not hold that urinalysis of federal employees and regulated workers intruded upon privacy interests until April 1989. (See *Skinner* v. *Railway Labor Exec. Assn.*, *supra*, 489 U.S. —— [103 L.Ed.2d 639]; *Treasury Employees* v. *Von Raab*, *supra*, 489 U.S. —— [103 L.Ed.2d 685].) The first California appellate decision to hold that article I, section 1 applied to private employers was not filed until November 1989. (See *Wilkinson* v. *Times Mirror Corporation*, *supra*, 215 Cal.App.3d 1034.) The City of San Francisco did not ban urinalysis testing until after Luck was terminated in July 1975. (See fn. 1, *ante*.) Therefore, we must conclude that there was no firmly established public policy against urinalysis in 1985 because, at that time, our Constitution's privacy provision had not been interpreted as prohibiting this testing. For all these reasons, we hold that Luck did not state a cause of action for wrongful termination in violation of public policy.[20]

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[20] In light of this ruling, we need not determine Southern Pacific's challenge to the jury instructions on the cause of action for wrongful termination.

V. DAMAGES*

A. *Punitive Damages*

Southern Pacific also challenges the jury's punitive damage award. The trial court denied Southern Pacific's motions for directed verdit, new trial, and judgment notwithstanding the verdict on punitive damages, despite its determination that the claim was "slim."

On appeal, Luck contends that the jury's finding that Southern Pacific was liable for the tort of intentional infliction of emotional distress supports the punitive damage award. Intentional infliction of emotional distress is an independent tort, not a mere element of damage. (See *State Rubbish etc. Assn.* v. *Siliznoff* (1952) 38 Cal.2d 330, 336-338; see also 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 402-403, pp. 483-484.) Punitive damages may be assessed in appropriate tort cases. (See *Acadia, California, Ltd.* v. *Herbert* (1960) 54 Cal.2d 328, 336-337; see also Civ. Code, § 3294, subd. (a) [punitive damages may be awarded in any action for breach of obligation not arising from contract].) Southern Pacific contends that the finding of intentional infliction of emotional distress cannot support the jury's punitive damages award because it, too, is based on the same conduct that supports the contractual breach of implied covenant. However, Southern Pacific chose not to challenge this aspect of the jury's verdict, thus abandoning on appeal its trial attacks on the emotional distress cause of action.[21] (See *Trailer Train Co.* v. *State Bd. of Equalization* (1986) 180 Cal.App.3d 565, 576, fn. 6.) The jury found Southern Pacific liable for intentional infliction of

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* See footnote *ante*, page 1.

[21] Southern Pacific does not challenge the cause of action for intentional infliction of emotional distress on appeal. We express no opinion about the continued viability of this cause of action in an employment termination context after *Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d 654.

emotional distress; absent challenge on appeal, this verdict remains intact. The elements of intentional infliction of emotional distress include extreme and outrageous behavior by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress. (*Cervantez* v. *J. C. Penney Co.* (1979) 24 Cal.3d 579, 593.) If Southern Pacific engaged in extreme and outrageous behavior, evidence of this conduct provides substantial evidence to support the finding that the employer acted maliciously, with an intent to oppress, and in conscious disregard of Luck. (See *Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922-923; see also Civ. Code, § 3294, subd. (c).) Therefore, there was substantial evidence to support the jury's punitive damage award.

B. *Mitigation of Damages*

Southern Pacific contends that Luck failed to mitigate her damages. The trial court denied its motion for nonsuit made on the ground that Luck suffered no appreciable economic damage because she did not mitigate damages. It also denied motions for directed verdict, new trial, and judgment notwithstanding the verdict urged on the same basis. When ruling on the motions for new trial and for judgment notwithstanding the verdict, the trial court stated that whether Luck had made reasonable efforts to mitigate damages was a jury question and noted that it had instructed the jury on this issue as Southern Pacific had requested.

A wrongfully terminated employee must make reasonable efforts to seek alternate employment in order to mitigate damages. (*Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 692.) The Luck jury was so instructed. The measure of recovery of such an employee is the amount of salary, less the amount which the employee has earned or with reasonable effort might have earned from other employment. (*Parker* v. *Twentieth*

Century-Fox Film Corp. (1970) 3 Cal.3d 176, 181.) One need not accept other employment, unless it is comparable or substantially similar to that of which one has been deprived, in order to mitigate damages; an employee may reject different or inferior employment without running afoul of his or her obligation to mitigate damages. (*Id.*, at pp. 182-183; see *Gonzales* v. *Internat. Assn. of Machinists* (1963) 213 Cal.App.2d 817, 822.) Southern Pacific had the burden of proof on mitigation of damages. (See *Steelduct Co.* v. *Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 654; see also *Blake* v. *E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 831.)

Southern Pacific contends that it made numerous offers of reemployment, including one at a higher salary than her original position. As Luck did not accept one, it reasons, she failed to mitigate her damages as a matter of law. However, whether a plaintiff did what was reasonable and necessary to mitigate damages is a question of *fact*, to be determined by the jury from all the evidence in the case. (*Gonzales* v. *Internat. Assn. of Machinists*, *supra*, 213 Cal.App.2d at p. 823; see *Parker* v. *Twentieth Century-Fox Film Corp.*, *supra*, 3 Cal.3d at p. 183 [summary judgment proper; no triable issue of fact on comparability presented]; see also *Ortiz* v. *Bank of America Nat. Trust and Sav. Ass'n* (9th Cir. 1987) 852 F.2d 383, 387 [reasonableness of mitigation efforts presents question of fact].) Luck testified that she was not qualified for some of the positions available and that the higher salaried position was less challenging than her original job. This evidence is sufficient to support the jury's implied finding that the work was not comparable to her original job, relieving Luck of the duty to accept these offers in order to mitigate damages. Southern Pacific failed to carry its burden of proof on mitigation of damages. (See *Healdsburg Police Officers Assn.* v. *City of Healdsburg* (1976) 57 Cal.App.3d 444, 456.)

Luck also testified that she felt humiliated when she went back to Southern Pacific to interview for a position

and that she did not trust her former employer. Southern Pacific contends that this is the *real* reason why Luck did not accept any position with them. However, the jury was instructed that Luck's duty to take reasonable steps to minimize her damages by seeking comparable employment included such employment at Southern Pacific. This instruction did not permit the jury to allow Luck to reject a comparable job offer from Southern Pacific. We must presume that the jury followed this instruction. (*People* v. *Bruce*, *supra*, 208 Cal.App.3d 1099, 1106.) The trial court did not err by submitting this issue to the jury.

VI. ATTORNEY FEES

In a separate appeal, Luck challenges the trial court's denial of her motion for attorney fees. On motion, a court may award attorney fees to a successful party against an opposing party in an action resulting in the enforcement of an important right affecting the public interest if a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the public; the necessity and financial burden of private enforcement are such as to make the award appropriate; and such fees should not, in the interest of justice, be paid out of the recovery. (Code Civ. Proc., § 1021.5.) Luck moved for nearly $300,000 in attorney fees after trial. The trial court held that she established that her action resulted in the enforcement of an important right affecting the public interest and that a significant benefit has been conferred on a large class of persons as a result of this decision. However, the trial court ruled that Luck did not establish that the necessity and financial burden of private enforcement made a fee award appropriate. The court reasoned that an award of attorney fees would be appropriate if it would encourage litigation of issues that would not otherwise be brought, absent the possibility of receiving attorney fees. It found that Luck's act of seeking sub-

stantial damages demonstrated a significant financial incentive for her to bring the underlying action, and that she had failed to establish that the litigation costs transcended her personal interest in the action. Although it denied her motion, the trial court noted the high quality of Luck's representation.

On appeal, Luck contends that the trial court applied the wrong standard when evaluating the merits of her motion. We disagree. The trial court considered the criteria set forth in the statute and found that one—that the necessity and financial burden of private enforcement make the award appropriate—did not exist. (See *Woodland Hills Residents Assn., Inc.* v. *City Council* (1979) 23 Cal.3d 917, 934-935.) The financial burden of private enforcement requirement means that an award of attorney fees under section 1021.5 of the Code of Civil Procedure is only appropriate when the cost of the claimant's legal victory transcends his or her personal interest—i.e., when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his or her individual stake in the matter. (*Id.* at p. 941.) The trial court specifically found that Luck did not establish this fact. This factor focuses not on Luck's abstract personal stake in the case, but on the financial incentives and burdens related to bringing suit. (See *Press* v. *Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321, fn. 11; *California Common Cause* v. *Duffy* (1987) 200 Cal.App.3d 730, 751.) Luck had the burden of proof on this issue. (See *Beach Colony II* v. *California Coastal Com.* (1985) 166 Cal.App.3d 106, 113.) She did not show that the lawsuit placed a burden on her out of proportion to her individual interest in the matter. (See *Save Oxnard Shores* v. *California Coastal Com.* (1986) 179 Cal.App.3d 140, 154; *Beach Colony II* v. *California Coastal Com.*, *supra*, at p. 113.) Therefore, the trial court did not abuse its discretion in denying the motion for attorney fees. (See *Schmid* v. *Lovette* (1984) (154 Cal.App.3d 466, 477.)

Finally, Luck moves this court for attorney fees on appeal. However, Luck still has not satisfied the last prong of the statutory test—that the cost of her legal victory transcends her personal interest in the case. As such, we exercise our discretion and deny her motion for attorney fees on appeal. (See Code Civ. Proc., § 1021.5.)

The judgment on the merits (Case No. A040995) is affirmed. The trial court order denying attorney fees (Case No. A042205) is affirmed. Luck's motion for attorney fees on appeal is denied. Luck is entitled to costs for the appeal on the merits (Case No. A040995) and Southern Pacific is entitled to costs for the fee order appeal (Case No. A042205), as the trial court shall fix them.

CHANNELL, J.

I CONCUR:

PERLEY, J.

I dissent from the holding (part IV of the opinion) that an employer who seeks to burden the right of privacy of an employee may then fire the employee for resisting those efforts and avoid any tort liability for the firing.

The question is whether Barbara Luck stated and proved a cause of action for wrongful discharge in violation of public policy. What she stated and proved to the jury's satisfaction is that she was fired for insisting upon her right of privacy. Nevertheless the majority concludes that even though her privacy rights were unlawfully impaired, she has no claim in tort for the company's conduct because (1) public policy was not involved ("The right to privacy is, by its very name, a private right, not a public one") (majority opn., *ante*, p. 38) and (2) the public policy was not firmly established at the time of her retaliatory firing. (Majority opn., *ante*, p. 39.)

A cause of action for wrongful termination in violation of public policy is not new. Our Supreme Court in *Tameny* v. *Atlantic Richfield Co.* (1980) 27 Cal.3d 167 explained ten years ago that such a discharge is "wrongful" because the employer has a duty implied in law to conduct its affairs in compliance with fundamental principles of public policy. What the court made plain was that to recover for tortious discharge an employee must plead and prove that he or she was discharged for a reason contravening fundamental principles of public policy. That requirement was in no way diminished by the recent decision in *Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d 654. In truth it was reinforced in that the Supreme Court there saw the issue before them precisely in such *Tameny* terms and said so. "Regardless of whether the existence of a statutory or constitutional link is required under *Tameny*, disparagement of a basic *public* policy must be alleged, and we turn now to determining whether plaintiff has done so here." (*Id.* at p. 669.)

The Supreme Court in *Foley* emphasized *Tameny*'s insistence that the public policy basis for the cause of action must be firmly established, fundamental and substantial. (*Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 670, fn. 11.) Applying that test it found no substantial public policy which prohibits an employer from discharging an employee for reporting information to the employer relevant to the employer's interest. Because it determined that the duty of an employee to disclose information to his employer serves only the private interest of the employer, it held that "the rationale underlying the *Tameny* cause of action is not implicated." (*Id.* at p. 671.) In layman's terms there was no public policy involved.

In the instant case Barbara Luck thought she located the public policy right at the start of this state's basic document which reads: "PREAMBLE. We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution. ARTICLE I. DECLARATION OF RIGHTS. § 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

Unlike the majority I find the public policy basis for Barbara Luck's cause of action right where she finds it, and I find it to be firmly established, fundamental and substantial. What could be more firmly established than the very first section of the first article of the state constitution? What could be more fundamental than that document's enumeration of inalienable rights? What could be more substantial than "enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy"? Having met the requirements of *Tameny* and *Foley*, she has stated and proved her cause of action.

The analysis of the majority is doubly flawed. It applies an inappropriate test to the wrong policy and therefore reaches the wrong result. The majority apply the tests set out in *Foley* without regard to the fundamental distinction that this case involves public policy derived from a personal, constitutional right and not public policy as reflected in a criminal or regulatory statute.

To illustrate the type of conduct which "inures to the benefit of the public at large rather than to a particular employer or employee," *Foley* looked at cases in which the employer sought to compel an employee to engage in illegal conduct by unlawfully fixing prices (*Tameny* v. *Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170) or by committing perjury before a legislative committee. (*Petermann* v. *International Brotherhood of Teamsters* (1959) (174 Cal.App.2d 184, 188-189.) In addition the opinion notes with apparent approval instances where the tort arose because an employee was fired for disclosing illegal conduct by reporting criminal activity (*Garibaldi* v. *Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367, 1374; *Palmateer* v. *International Harvester Co.* (Ill. 1981) 421 N.E.2d 876, 879-880) or by objecting to unsafe working conditions (*Hentzel* v. *Singer Co.* (1982) 138 Cal. App.3d 290; *Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d at 670).

These cases, as the majority read *Foley*, define the outer limits of the universe of conduct which can give rise to the tort of wrongful discharge in violation of public policy. Such a reading means that the cause of action will not be available if the public policy is protective of a purely personal right.

Employer violations of personal rights will virtually never [1] yield a cause of action for the injured employee because violations of personal rights cannot survive the

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[1] Presumably a contract to enslave would sufficiently offend public policy to be void. (Cal. Const., art. I, § 6.)

void-if-they-had-contracted-for-it test suggested in a *Foley* footnote (*Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal. 3d at p. 670-671, fn. 12) and applied by the majority. Nothing in the *Foley* decision suggests that the voidness test has any applicability to evaluating a public policy with a constitutional source. In contrast to the situation at hand which involves inalienable rights specifically set forth in the Constitution, *Foley* arose out of the assertion of, what Chief Justice Lucas most charitably referred to as, a "statutory touchstone" which appellant argued gave rise to a duty to report information to the employer. (*Id.* at p. 669.) The court found it "unclear" whether the "alleged duty is one founded in statute" (*id.* at p. 670), but went forth to decide the case "[w]hether or not there is a statutory duty." (*Ibid.*) In doing so the court referred to the difficulty of finding substantial public policy reflected in statutes by explaining that ". . . many statutes simply regulate conduct between private individuals, *or impose requirements whose fulfillment does not implicate fundamental public policy concerns.*" (*Id.* at p. 669, emphasis added.) It hardly can be said with a straight face that the declaration of rights contained in Article I, section 1 of the Constitution imposes requirements whose fulfillment does not implicate fundamental public policy concerns.

Since it is the task of constitutions by their very nature to enunciate high public policy rather than to simply regulate conduct between private individuals, it makes no sense to apply to such documents—particularly to a bill of rights—any test designed to determine whether a statute sets forth public policy. Nothing whatsoever on the face of the *Foley* decision requires such an unusual determination, and since this court has an obligation to construe Supreme Court decisions so as not to reach an absurd result, I would not apply the test suggested in footnote 12 of *Foley* to the Constitution of the State of California.

Unless we accept the perfectly logical and defensible position that inalienable personal rights inure by their very nature to the benefit of all Californians and thus to the public benefit, we accord no practical protection to the very rights given the greatest deference by our constitution. The bizarre outcome of the majority's reasoning is evident here. Barbara Luck has, they acknowledge, an inalienable right to be free from an involuntary intrusion into her privacy by her employer's demand she submit to urinalysis. Had her employer not fired her for refusing the test, she presumably could have obtained injunctive relief from the testing. However, because her employer immediately fired her for insubordination before she could seek such judicial vindication of her rights she is deprived of her job *and* of any tortious claim for the employer's conduct.[2]

My second objection to the majority's reasoning is that they incorrectly identify the public policy interest as a "policy prohibiting urinalysis." (Majority opn., *ante*, pp. 39-40.) The policy at issue is not urinalysis, but the preservation of personal privacy.

In *Foley* the Supreme Court made it clear that the policy we look to in search of public interest is the source of the duty implied in law upon the employer. (*Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 666.) Here the duty derives from Article I, section 1 of the California Constitution. Had Luck instead relied on a public policy embodied in a statute prohibiting involuntary physical testing of employees then the issue of

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[2] In the recently decided case of *Semore* v. *Pool* (Feb. 2, 1990, E006138) —— Cal.App.3d ——, —— [typed opn. pp. 11-12], the majority similarly conclude that the privacy interests of an employee terminated for refusing a compelled drug test implicate a fundamental public policy. As they note, "privacy, like the other inalienable rights listed first in our Constitution, is at least as fundamental as the antitrust statutes in *Tameny* or the perjury statutes in *Petermann*." (*Id.* at p. — [typed opn. at p. 9].)

whether such a hypothetical statute in 1985 prohibited urinalysis would be relevant. She did not. Californians acknowledged their privacy rights by amending our Constitution to include privacy in 1974, some 11 years before Luck's firing. The policy protecting privacy embodied in that amendment, both temporally and philosophically, was firmly established, fundamental, substantial and clearly mandated long before Luck was fired.

The limits the majority impose upon a public policy based wrongful discharge are inconsistent both with basic human dignity and with our Supreme Court's decisions. Without acknowledging that they do so the majority seek a return to an era of masters and servants. As Justice Tobriner reminded us in *Tameny* modern notions of employer relations were "enunciated by this court more than 35 years ago, [when it noted] that '[t]he days when a servant was practically the slave of his master have long since passed.' [Citation.]" (*Tameny* v. *Atlantic Richfield Co.*, *supra*, 27 Cal.3d at p. 178.)

For these reasons I would affirm the judgment below on the ground that Barbara Luck proved a cause of action for wrongful discharge in violation of public policy. Further I join only in the resolution of the punitive damages issue (part V, section A), without adopting the analysis set forth therein.[3] In all other respects I concur in the majority opinion.

POCHE, Acting P.J.

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[3] The question of whether Ms. Luck may retain the punitive damages awarded by the jury is a simple one. Southern Pacific did not challenge on appeal the cause of action for intentional infliction of emotional distress. (Majority opn., *ante*, p. 41.) There was a general verdict in the case, and the intentional infliction claim is sufficient in and of itself to support punitive damages. Any additional discussion by this court is nothing but dicta.

Nor do I see any reason to even raise a question which is not before us, namely the availability in a wrongful discharge case of a cause of action for intentional infliction of emotional distress post-*Foley*. (Majority opn., *ante*, p. 41, fn. 21.)

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A040995

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A042205

CERTIFIED FOR PARTIAL PUBLICATION

THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

A040995

San Francisco County
(Super. Ct. No. 843230)

BARBARA A. LUCK,
Plaintiff and Respondent,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant and Appellant.

A042205

San Francisco County
(Super. Ct. No. 843230)

BARBARA A. LUCK,
Plaintiff and Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant and Respondent.

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on February 21, 1990, be modified in the following particulars:

1. On page 1, the following should be added at the end of the asterisk footnote:

> and the dissent is certified for partial publication with the exception of footnote 3.

2. On pages 7-8, the last sentence on page 7, the first and second sentences on page 8 [last full sentence at App. 6a through first full sentence at App. 7a], and supporting citations are deleted and the following is inserted in its place:

> While there are cases that apply the RLA to disputes that do not involve a collective bargaining agreement (see, e.g., *Thomas* v. *New York, Chicago & St. Louis R. Co.* (6th Cir. 1950) 185 F.2d 614, 616-617), this has not been uniformly done. In a recent case, the Seventh Circuit grappled with this question, ruling that there would be no reason to invoke RLA arbitration if the case presented no issue of the meaning or application of a collective bargaining agreement. The court admitted that the RLA defines the arbitrator's domain as employment disputes growing out of "grievances *or* out of the interpretation or application of [collective bargaining] agreements," implying that more than contract interpretation is covered. (*Lancaster* v. *Norfolk and Western Ry. Co.* (7th Cir. 1985) 773 F.2d 807, 814, cert. den. 480 U.S. 945; see 45 U.S.C. § 153, subd. (i).) However, the Seventh Circuit found this language to be redundant, holding that a "grievance" was a claim of

violation of the collective bargaining agreement. "Congress had no intention of making a grievance a separate basis for arbitration from disputes over the interpretation or application of the collective bargaining contract." (*Lancaster* v. *Norfolk and Western Ry. Co.*, *supra*, at p. 814.) Our Supreme Court cited *Lancaster* with approval when it stated that the line between a tort actionable in court and an employment dispute actionable only in a grievance arbitration proceeding is not sharp, except in extreme cases. (*DeTomaso* v. *Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 526, cert. den. 484 U.S. 829.) Considering the conflicting federal authority on this issue, we are more persuaded by the analysis of *Lancaster*, which is consistent with *Mungo*.

The RLA Adjustment Board has no jurisdiction over disputes that do not arise out of collective bargaining agreements. (*Mungo* v. *UTA French Airlines*, *supra*, 166 Cal.App.3d at p. 331; see *Lancaster* v. *Norfolk and Western Ry. Co.*, *supra*, 773 F.2d at p. 814.)

3. On pages 7-8 [App. 6a-7a], footnote 5 is deleted. All subsequent footnotes are renumbered.

4. On page 35, the last sentence in the first paragraph [the second full sentence at App. 29a] is deleted and the following is inserted in its place:

The jury heard evidence from which it could conclude that Southern Pacific promised Luck a pretermination hearing—before which Luck intended to seek injunctive relief, if necessary, to prevent her termination—and agreed to continue her insurance coverage during an interim period, but did not keep these promises. This evidence provides substantial evidence to support the jury's finding that Southern Pacific acted in bad faith.

5. On page 35 [App. 29a], footnote 17 is deleted. All subsequent footnotes are renumbered.

6. On page 42 [App. 35a], the last citation in the first paragraph is modified to read:

> see also Civ. Code, § 3294, subd. (c)(1) ["malice" means conduct intended by defendant to cause injury to plaintiff]; *Newman* v. *Emerson Radio Corp.*, *supra*, 48 Cal.3d at p. 992 [retroactivity of *Foley* need not necessitate disruptive retrials].)

7. On page 8 of the dissent, the second sentence of the first full paragraph [second sentence of last paragraph at App. 45a] shall be modified to read as follows:

> Further I join only in the resolution of the punitive damages issue (part V, section A [unpublished portion of the majority opinion]), without adopting the analysis set forth therein.

8. On page 8 of the dissent [App. 45a], footnote 3 is to be omitted from the published portion of the dissent.

The modification affects only Case No. A040995. There is no change in the judgment.

Appellant's petition for rehearing (Case No. A040995) is denied.

Dated: Mar. 22, 1990

/s/ Poche
POCHE, Acting P.J.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

First Appellate District, Division Four, No. A040995
S014832

IN BANK

BARBARA A. LUCK,
Respondent

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellant

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

[Filed May 31, 1990]

Appellant's petition for review DENIED.

/s/ Lucas
Chief Justice

(2)

No. 90-355

In The

Supreme Court of the United States

October Term, 1990

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

BARBARA A. LUCK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

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QUESTION PRESENTED

Do the administrative processes of the Railway Labor Act preclude a railroad employee who is not covered by a collective bargaining agreement from pursuing a common law contract and tort action, grounded on a state constitutional privacy provision?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 90-355

In The

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SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

BARBARA A. LUCK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

Respondent Barbara A. Luck respectfully prays that this Court deny the petition for writ of certiorari filed by Southern Pacific Transportation Company on August 28, 1990.

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

Article I, section 1 of the California Constitution provides in pertinent part:

> All people are by nature free and independent and have inalienable rights. Among these are . . . privacy.

STATEMENT OF THE CASE

In July 1985, petitioner Southern Pacific Transportation Company (hereinafter, "SP") ordered all 507 "exempt" employees (workers not covered by a collective bargaining agreement) in the engineering department to submit without notice to urinalysis to test for drugs, alcohol, or medications. App.[1] 3a. SP had no reason to believe that any of the exempt employees was using drugs or abusing alcohol. RT 797.

At the time of the mass urinalysis, respondent Barbara Luck (hereinafter, "Luck") was a computer programmer in SP's engineering department, an exempt position that she had held for four years. App. 2a, 4a. She had no safety-related duties, a fact admitted by her supervisor. App. 3a-4a, 21a-25a; RT 1656-1657.

Luck refused to submit a urine sample as a matter of principle: "[F]rom my background and understanding of my rights as an American, I felt I did not have to honor such a request for no reason." App. 3a; RT 438. Four days later, SP summarily terminated her for insubordination.

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[1] "App." refers to the appendix to Southern Pacific's Petition for Writ of Certiorari. "A." refers to the appendix to this Opposition to Petition for Certiorari. "RT" refers to the Reporter's Transcript. "CT" refers to the Clerk's Transcript. "Supp. App." refers to the Appendix Supplementing Clerk's Transcript, filed in the California Court of Appeal.

App. 3a. SP admitted that the company did not believe Luck was taking drugs, alcohol, or medication or that her job performance was impaired in any way. App. 3a; RT 2034-2035.

After her termination, Luck's attorney wrote to SP's Assistant Vice President for Labor Relations, stating: "We hereby request that if they exist, you provide us with any and all written grievances, procedures, rules and regulations which apply to her discharge. . . . " Supp. App. 51. Identical replies from the Assistant Vice President and from SP's attorney, Robert Bogason, who is of counsel in this Court, stated that Luck's position was "fully exempt (non-union)" and "[t]here are no written agreement procedures, rules or regulations which apply to the removal or discharge of an employee from an exempt position." Supp. App. 52-53.

REASONS FOR DENYING THE WRIT

The California Court of Appeal's decision that the Railway Labor Act (hereinafter, "RLA" or "the Act") does not preempt a wrongful termination action by an employee not covered by a collective bargaining agreement is consistent with this Court's interpretation of the Act for over 40 years. The Court has uniformly held that the RLA's administrative processes are intended to resolve disputes over collective bargaining agreements, not garden-variety employment contracts. There is no conflict of decisions on this point; no case cited by SP involved preemption of suits by unrepresented employees.

Even if Luck had had access to the RLA procedures, the instant case would fall within a preemption exception for actions seeking to enforce a provision independent of the collective bargaining agreement that provides minimum substantive guarantees to all employees. Finally, this case involves unique facts, affecting few other employees, because SP insisted that Luck, an exempt employee, had no administrative remedies available to her.

I. Railway Labor Act Preemption Applies Only to Employees Covered by Collective Bargaining Agreements.

The California Court of Appeal's holding that state law wrongful discharge suits are preempted by the Railway Labor Act only if the discharged worker was covered by a collective bargaining agreement is consistent with the purpose, language and structure of the Act, as interpreted by this Court for over 40 years.

This Court has repeatedly construed the RLA's references to "agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. § 153, First (i)) to apply to *collective bargaining agreements*, not to individual employment contracts. For example, in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978), the Court described the purposes of the RLA as follows:

> In enacting this legislation [the RLA], Congress endeavored to promote stability in labor-managment relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee

> *disputes arising out of the interpretation of collective bargaining agreements.* (Emphasis added.)

Accord: *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 242 (1950) [RLA "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements"].

This Court's narrow interpretation of the term "agreements" is also evident in its many holdings concerning the National Railroad Adjustment Board. In *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551 (1959), the Court stated that Congress "entrust[ed] an expert administrative board," the National Railroad Adjustment Board, "with the interpretation of collective bargaining agreements." This Court has taken judicial notice that such an expert tribunal is essential because "provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application." *Id.* at 553. See *Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. ___, 105 L.Ed.2d 250, 267 (1989) [collective bargaining agreements are not ordinary private contracts and are not governed by common-law concepts]; *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 261-262 (1965) [Adjustment Board's expertise lies in interpreting bargaining agreements, which are different from private employment contracts]. A centralized agency like the Adjustment Board is also critical to provide a uniform interpretation of bargaining contracts that are national in scope. "The same collective bargaining agreement must be construed with the same need for uniformity of interpretation. . . . " *Pennsylvania R.R. v. Day, supra*, 360 U.S. at

551. None of these considerations applies to individual employment contracts.[2]

The Act's references to "grievances" have also been uniformly construed by this Court to mean disputes arising out of bargaining agreements. 45 U.S.C. § 151a (5), § 153 First, (i). Thus, in *Union Pacific R.R. v. Price*, 360 U.S. 601, 616 (1959), the Court stated that the "RLA's statutory scheme . . . was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements." *Accord, Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 33 (1957) ["grievances" are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee"]; *Slocum v. Delaware, L. & W. R.R., supra*, 330 U.S. at 242 ["grievance" equated with "dispute concerning interpretation of an existing bargaining agreement"]. *See Lancaster v. Norfolk & Western Ry.*, 775 F.2d 807, 814 (7th Cir. 1985) ["A 'grievance' is a claim of violation of the collective bargaining agreement. Congress had no

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[2] An Adjustment Board referee, who was dean of the University of Wisconsin Law School, described the Board as "an instrument for making collective agreements work and survive." Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 598 (1937).

The Adjustment Board is equally composed of representatives of the carriers and the national labor unions. "Each member . . . shall be compensated by the party or parties he is to represent." 45 U.S.C. § 153, First (a)-(c), (g). No member of the Adjustment Board "represents" exempt workers, like Luck, who are not subject to a bargaining agreement.

intention of making a grievance a separate basis for arbitration from disputes over the interpretation or application of the collective bargaining contract"].

The National Railroad Adjustment Board ("NRAB") itself holds that it has no jurisdiction to grant relief to an employee who is not subject to a collective bargaining agreement, despite the Act's broad definition of "employee." 45 U.S.C. § 151, Fifth. As the Adjustment Board stated in a recent decision involving an exempt employee:

> This Board does not have jurisdiction under the Railway Labor Act to entertain claims by employees not covered by a Collective Bargaining Agreement. As has been stated in numerous previous awards, this Board does not sit as a court of equity. The function of this Board is limited to deciding disputes in accordance with the provisions of a controlling Labor Agreement as applied to the facts and evidence in the record. NRAB, Fourth Division, Award No. 4548 (1987) A.1-A.2.

Accord, NRAB, Fourth Division, Awards No. 4668 (1989) and 4513 (1987) A.4-A.10. Such an administrative interpretation is "of great importance, reflecting, as it does, the needs and fair expectations of the railroad industry. . . . " *Pennsylvania R.R. v. Day, supra*, 360 U.S. at 552. It demonstrates that resort to Adjustment Board processes would have been futile here. *See Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 330-331 (1969) [exhaustion of administrative remedies excused if futile].

In sum, certiorari should be denied because the decision of the California Court of Appeal was thoroughly consistent with this Court's interpretation of the Act over

four decades. SP's argument for a "plain-meaning" reading of the statute ignores that lengthy and uniform history.[3]

II. There Is No Conflict in Decisions on the Issue of Whether an Unrepresented Employee's Court Action Is Preempted by the RLA.

Certiorari should also be denied because there is no conflict of decisions on the issue in this case – whether a court action by an unrepresented employee is preempted

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[3] The limited excerpt of the 1926 legislative debates quoted in SP's petition does not detract from the Court's unbroken construction of the RLA, for at least three reasons. First, the views expressed are those of only one legislator. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 (1980). Second, it is difficult to determine whether the debate concerned employees, like Luck, not covered by a bargaining agreement or workers subject to such a contract but not members of the union.

Finally, the quoted comments reflect the then-prevailing view that use of the Act's administrative processes was voluntary, not compulsory. *See, e.g., Union Pacific R.R. v. Price, supra*, 360 U.S. at 609 ["Congress did not . . . in the original 1926 Act create the National Railroad Adjustment Board or make the use of such an agency compulsory upon the parties"]. The 1934 amendments, which established the Adjustment Board, made important changes in that respect. *Id.* at 610-614; accord, *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R., supra*, 353 U.S. at 35-39. Not until 1972, however, did this Court hold that resort to the RLA's administrative procedures was mandatory – but only for "disputes over the interpretation of a collective bargaining agreement." *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 322, 324 (1972). Consequently, comments in 1926 have limited significance on the question of compulsory resort to the Adjustment Board.

by the RLA. SP cites no case holding that preemption applies in this circumstance, and we have found none. The only cases on point are consistent with the decision below in holding that there is no preemption because there is no collective bargaining agreement. *E.g., Mungo v. UTA French Airlines*, 166 Cal. App.3d 327 (1985).

The four cases cited by SP either did not involve preemption, did not involve unrepresented employees, or both. Moreover, two of the decisions are at least 40 years old.

In *Thomas v. New York, Chicago & St. Louis R.R.*, 185 F.2d 614, 615 (6th Cir. 1950), the Sixth Circuit held that a discharged steward who was "not a member of a union" could voluntarily submit his grievance to the Adjustment Board. No issue of preemption was involved, and the court did not make clear whether the employee was simply a non-union member in a union-represented bargaining unit or whether, like Luck, he was an exempt employee not subject to a union contract.

Womble v. Seaboard System R.R., 804 F.2d 635 (11th Cir. 1986) *cert. denied*, 481 U.S. 1051 (1987), was a two-paragraph *per curiam* decision, which affirmed without analysis the dismissal of a "non-union" employee's wrongful discharge action for failure to pursue RLA remedies. Like *Thomas, Womble* did not make clear whether the worker was a non-union member in a represented unit or an exempt employee not covered by a collective bargaining agreement. Of the three cases summarily cited in the decision, two involved unionized employees covered by union contracts. *Andrews v. Louisville & Nashville R.R., supra*, 406 U.S. 320; *Rader v. United Transportation Union,*

718 F.2d 1012 (11th Cir. 1983). The third was *Thomas v. New York, Chicago & St. Louis R.R., supra.*

In *Hodges v. Atchison, T. & S.F. Ry.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984), the court held that preemption applied to a wrongful discharge action by a represented worker who was employed under a collective bargaining agreement, even though the employee did not belong to the union. "Mr. Hodges' employment in the craft governed by the applicable collective bargaining agreement makes him subject to the terms and conditions of employment obtained in the agreement, and the collective bargaining agent was obliged to represent him," the court stated. *Id.* at 417.

Finally, *Elgin J. & E. Ry v. Burley*, 325 U.S. 711 (1945) concerned neither preemption nor unrepresented employees, but rather the authority of a union to compromise and settle the monetary claims of represented employees or to submit them for determination by the Adjustment Board. In dictum, this Court characterized a "minor" dispute under the RLA as a disagreement that

> relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. *Id.* at 723.

As Judge Posner noted in *Lancaster v. Norfolk & Western Ry., supra*, 773 F.2d at 814, "If this dictum were an accurate statement of the law, . . . all personal injury claims by railroad workers against their employers would

be within the exclusive jurisdiction of the arbitration tribunals set up under the Railway Labor Act – something no one believes." This Court agreed with Judge Posner in *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987), holding that personal injury claims under the FELA are not preempted by the RLA.

The Court quoted the *Burley* dictum in *Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n, supra*, ___ U.S. ___, 105 L.Ed.2d at 261-263, when discussing the RLA's distinction between major and minor disputes. The Court stressed that, whether a dispute is major or minor, it must still involve a collective bargaining agreement. Thus, the *Burley* dictum, unclear in 1945, has lost any remaining significance in the intervening half-century.

III. Preemption Is Inapplicable Because the Instant Case Is Based on a State Constitutional Provision Which Provides Minimum Substantive Guarantees to All Workers.

Certiorari should be denied because, even if Luck had had access to RLA remedies, this case would fall within an exception to preemption developed by this Court for actions which seek to enforce minimum substantive guarantees provided to *all* employees.

The Court has repeatedly held that the preemption doctrine does not preclude unionized workers from bringing court actions to enforce federal or state substantive rights available to all workers. Indeed, just three years ago, in *Atchison, T. & S.F. Ry. v. Buell, supra*, 480 U.S. at 565, the Court held that an injured railroad employee's action under the Federal Employers' Liability Act was not

preempted by the RLA because the FELA provides "substantive protection against negligent conduct that is independent of the employer's obligations under its collective bargaining agreement. . . . " *Accord, Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988) [no preemption of union worker's retaliatory discharge action under state workers' compensation statute; no interpretation of union contract required]; *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 737 (1981) [no preemption where employee's claim based on Fair Labor Standards Act, which provides "minimum substantive guarantees to individual workers"].

Luck's action was bottomed on the California Constitution's privacy provision, which expressly protects the privacy of "[a]ll people." Cal. Const., art. I, § 1; App. 12a, 29a. Thus, certiorari should be denied because the decision of the California Court of Appeal is consistent with a well-established exception to preemption.[4]

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[4] This preemption exception has repeatedly been applied under the Railway Labor Act, frequently in cases involving SP. *E.g., Evans v. Southern Pacific Transportation Co.*, 213 Cal. App.3d 1378, 1382-1388 (1989), *cert. denied*, ___ U.S. ___, 110 L.Ed2d 661 (1990) [race and handicap discrimination claim not preempted because not "inextricably intertwined" with matters subject to collective bargaining agreement]; *Hollars v. Southern Pacific Transportation Co.*, 792 P.2d 1146, 1150 (N.M. App. 1989), *cert. quashed*, ___ N.M. ___ (1990) [tort claims not preempted under *Lingle*]; *Quinn v. Southern Pacific Transportation Co.*, 76 Or. App. 617, 711 P.2d 139, 143-144 (1985) [handicap discrimination claim not preempted because based on independent statutory right, not on collective bargaining agreement].

IV. The Outcome of This Case Depends on its Special Facts, Which Will Affect Few Other Litigants.

The unique facts of this case make the grant of certiorari inappropriate.

In response to the inquiry of Luck's attorney concerning "any and all written grievance procedures, rules and regulations which apply to her discharge," SP's Labor Relations Vice President and its attorney both stated that none existed because Luck's job was "fully exempt (non-union)." Supp. App. 51-53. Not until long after this action was filed did SP do an about-face and contend that Luck should have exhausted administrative remedies under the RLA. CT 404-410.

SP's conduct amounted to a repudiation of the RLA's administrative procedures and estops SP from relying on the allegedly unexhausted procedures as a defense to her action. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). Because of these unusual facts, which will affect few other litigants, certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4548
Referee Herbert L. Marx, Jr. Docket Number 4568

PARTIES TO DISPUTE: John P. Leary, Jr.
Consolidated Rail Corporation

STATEMENT OF CLAIM:

Unjustified abolishment of my non-agreement Pricing Analyst position in the Marketing & Sales Department on March 2, 1982.

OPINION OF BOARD:

On February 5, 1982, Claimant was notified by letter that his non-agreement position as Pricing Analyst in the Carrier's Marketing and Sales Department was being abolished with the close of business on March 2, 1982. The Claimant contends that the job abolishment was not justified and seeks reinstatement to the position as well as backpay and other benefits which allegedly were lost to the Claimant as a result of the job abolishment.

As noted above, at the time of Claimant's job abolishment, he was employed in an exempt non-agreement position. The Claimant did not occupy that position as a matter of any contractual right arising from a Collective Bargaining Agreement, nor has the Board been requested to interpret the provisions of any such Agreement. This Board does not have jurisdiction under the Railway Labor Act to entertain claims by employes not covered by a Collective Bargaining Agreement. As has been stated in numerous previous Awards, this Board does not sit as a court of equity. The function of this Board is limited to

deciding disputes in accordance with the provisions of a controlling Labor Agreement as applied to the facts and evidence in the record.

The Carrier raises additional procedural and substantive defenses to the Claim which this Board need not reach in view of the finding that the Board is without jurisdiction to hear the dispute.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

AWARD

Claim dismissed.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

/s/ Nancy J. Dever
Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 21st day of May 1987.

APPENDIX 2

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 4668
Docket No. 4694
89-4-88-4-37

The Fourth Division consisted of the regular members and in addition Referee William F. Euker when award was rendered.

PARTIES TO DISPUTE: (Earl C. Wilson
(
(CSX
(Transportation, Inc.

STATEMENT OF CLAIM:

1 – *Wrongful discharge,* from my non-contract employment with CSX Transportation as a result of a "purported CSX Workforce Reduction Program".

2 – That my position *was not eliminated.*

3 – That actions taken by CSX's "Distribution Services Group" *failed to comply with specific procedures* as outlined by Mr. John W. Snow, President and Chief Executive Officer, CSX Transportation Company.

4 – That my position was filled by a less qualified *"railroad"* employee and subsequently his position filled by a *"non-railroad"* individual.

5 – That *contrary* to the stated "reduction of positions, and or employees", has resulted with the engagement of more *"non-railroad"* employees, under a questionable subsidiary company, as defined by the

Interstate Commerce Commission, *to perform functions that previously were performed by railroad employees.*

6 – That because of the wrongful actions, as cited above, *I am seeking reinstatement* to my former position *with return of lost wages and benefits,* retroactive to February 1, 1988, when wages and benefits were wrongfully halted, *less unemployment compensation* received from the Railroad Retirement Board.

FINDINGS:

The Fourth Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

This is a claim in behalf of a non-contract employe [official] who contends his employment rights were violated when, as a result of reduction in force, his position was allegedly eliminated and he was requested to elect one of several options made available to that class of employes to be exercised prior to December 31, 1987. The Claimant also held seniority as a Clerical employe, however his rights in that class are not involved in the present dispute.

From October 1, 1978, the Claimant has maintained a non-contract position with the Carrier and was given various titles reflecting his management status and responsibilities. On June 15, 1987, the Carrier advised its non-contract employes that it was implementing a decision to "downsize" its non-contract work force, institute a hiring freeze and place a moratorium on general salary increases during 1987. Some of these cost reduction policies were also planned for subsequent years. The Claimant was notified by letter dated November 13, 1987, that his non-contract employment with the Carrier would end on December 31, 1987, as part of the Carrier's Workforce Reduction Program.

Briefly, the Claiment was given the option of a voluntary separation with one year's pay; remain on the payroll for one year; receive a pension benefit of five additional years of credited service and five additional years of age under the pension plan; exercise his seniority rights and be reimbursed for moving expenses; or be considered for available vacancies in other CSX companies, in which event, if moved to a new location, the non-contract relocation policy would apply.

The record does *not* show that Claiment accepted any one of the options listed above, but instead insisted on being retained in the Carrier's service on his former position or a position of comparable status. The claim progressed to the Board, for wages and benefits lost, is so framed.

The Carrier has at least two strings to its jurisdictional bow in defense of the claims. First, it asserts the Claimant is not an "employe" as that term is defined in

Section 151, Fifth, of the Railway Labor Act; consequently he has no standing to bring a dispute before the N.R.A.B. Secondly, it contends Claiment is a non-contract employe and the provisions of Section 153, First, (i) of the Railway Labor Act only apply and grant jurisdiction in those cases involving disputes "growing out of grievances or out of the interpretation or application of agreements;" therefore the Board would have no statutory authority to consider the case in either event.

The parties to the dispute have proffered Awards relative to the issues discussed above. Based upon our careful review of those decisions, we find that this Board has no jurisdiction in this matter. See Fourth Division Awards 4548, 4513, 4510, et al. In Fourth Division Award 2511, the Board decided:

> "In order for this Board to hold that claimant's termination was improper it would be necessary to find that Carrier violated an enforceable limitation on its otherwise unrestricted right to terminate employees with or without cause. But there was no contractual limitation on Carrier's right to terminate claimant, since his employment was not covered by any agreement. Moreover, the Railway Labor Act, which is the source of the Board's authority, does not contain any restriction on Carrier's right to hire or discharge employees. The Board is without authority to establish such a restriction by its own independent action. The claim therefore must be dismissed."

In addition, there is a serious question whether Claimant was an "employe" within the meaning of Section 151, Fifth, of the Railway Labor Act. See Fourth Division Awards 4276 and 14.

The Petitioner endeavors to bar the application of the foregoing principles by alleging that he was advised to submit his dispute to this Board by persons at the Interstate Commerce Commission, the National Mediation Board and the National Railroad Adjustment Board. Needless to say, even if the Claimant's representations are accurate, advice that a party may file a dispute does not commit the tribunal involved to a finding that it has jurisdiction to decide the merits. The Board cannot consider whether it has jurisdiction until a party attempts to invoke it. Where that authority is found wanting under the statute, it has no alternative but to dismiss the claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest: /s/ Nancy J. Dever
Nancy J. Dever Executive Secretary

Dated at Chicago, Illinois, this 16th day of February 1989.

APPENDIX 3

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4513
Referee Herbert L. Marx, Jr. Docket Number 4520

PARTIES TO DISPUTE: Lawrence A. McCabe
Consolidated Rail Corporation

STATEMENT OF CLAIM:

Unfair labor practices against me by Conrail.

OPINION OF BOARD:

Claimant was employed by the Carrier in a series of non-agreement management positions until 1981. He was then placed in a clerical position, represented by the BRAC Organization. This change was made, according to the Carrier, based on "reductions . . . in the work-force" of the Carrier.

The various claims and allegations made by the Claimant do not appear to concern violation of any BRAC Agreement in reference to his service in a clerical position. Rather, the claims and allegations concern the Claimant's perception of unfair treatment in 1981; and thereafter in reference to retention or placement in a management position. There is no sanction for this Board to concern itself with matters involving non-agreement management positions. As provided in Section 3, First (i) of the Railway Labor Act, the Board is concerned only, as to individuals, with "disputes between an employee . . . and a Carrier . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. . . . "

The allegations made by the Claimant thus have no standing for review by the Board.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute were granted the privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division.

ATTEST:

/s/ Nancy J. Dever
Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1987.

No. 90-355

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,
v.
BARBARA A. LUCK,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal for the First Appellate District

REPLY TO BRIEF IN OPPOSITION

Of Counsel:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-355

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

BARBARA A. LUCK,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal for the First Appellate District

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REPLY TO BRIEF IN OPPOSITION

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1. Luck inadvertently makes the case for the granting of certiorari. The Railway Labor Act mandates arbitration of all disputes arising from "agreements" between an individual "employee * * * and a carrier." 45 U.S.C. § 153, First (i). One searches the Brief in Opposition in vain for *any* argument as to why that plain language does not cover this dispute, arising from an agreement between an individual, Luck herself, and a carrier, Southern Pacific. In fact, Luck appears to concede that the statute itself, without more, fits her situation.[1]

Sidestepping the plain language of the Act, Luck simply asserts that such an interpretation would be incon-

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[1] Thus, Luck says the National Railroad Adjustment Board has held that it has no jurisdiction absent a collective bargaining agreement, "*despite* the Act's broad definition of 'employee.'" Brief in Opposition at 7 (emphasis added).

sistent with prior decisions of this Court. Far from supporting Luck's position, the cases cited merely underscore the fact that this Court has never addressed the specific issue raised here, and demonstrate the need for a decision by this Court resolving the very ambiguities in the case law which led to the erroneous state court decision below.

Virtually every decision cited by Luck *expanded* rather than narrowed the National Railroad Adjustment Board's jurisdiction and its ability to decide disputes. *See Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, —— U.S. ——, 109 S. Ct. 2477 (1989) (disputes arising from drug-testing program may be subject to mandatory adjustment); *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89 (1978) (*per curiam*) (Adjustment Board's determination of timeliness may not be disturbed by District Court or Court of Appeals); *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965) (District Court may not review merits of Adjustment Board decision); *Pennsylvania R.R.* v. *Day*, 360 U.S. 548 (1959) (Adjustment Board has exclusive jurisdiction of dispute over back wages); *Union Pacific R.R.* v. *Price*, 360 U.S. 601 (1959) (precluding relitigation of issues decided by the Adjustment Board); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950) (recognizing exclusive jurisdiction of Adjustment Board with respect to certain disputes).[2] Yet Luck anomolously argues that in those cases this Court adopted a "narrow interpretation of the term 'agreements'" and, implicitly, ignored the Act's plain language.[3] The cases contain no such holding.

Luck's argument rests on statements by this Court that the Act's mandatory adjustment procedures cover

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[2] The only arguable exception is *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30 (1957), in which this Court held that a District Court may order injunctive relief under the Norris-LaGuardia Act "to vindicate the processes of the Railway Labor Act." *Id.* at 41.

[3] Brief in Opposition at 5.

disputes concerning interpretation of collective bargaining agreements. However, the Court addressed collective bargaining agreements because those were the agreements before the Court. Nowhere in those cases did this Court suggest that the Adjustment Board's jurisdiction under the Act is limited to such disputes. This Court should grant certiorari and make explicit what should already be clear from the language of the Act itself: that the mandatory adjustment procedures in the Act apply to all railway employees, whether they are represented by a union or not.

2. As shown in our Petition for Writ of Certiorari ("Petition"), the plain language of the Act applies, and there is thus no need for reliance on legislative history here.[4] Even if such history were relevant, however, Luck makes almost no attempt to refute Southern Pacific's argument that the Act's legislative history compels reversal of the California Court of Appeal. Luck's discussion of that issue (relegated to a footnote) raises three points which are easily dismissed.

First, Luck contends that "the views expressed are those of only one legislator."[5] In fact, Senator Wheeler, a member of the Committee on Interstate Commerce, stated that the view cited was shared "by all the members of the committee," *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)*, 93d Cong., 2d Sess. 691 (1974) ("Legislative History"), and the view was repeated by several Senators in debate just prior to adoption of the Act.[6] Second, Luck's argument that it is unclear whether the debate concerned employees not represented by unions[7] is contradicted by clear statements from the Senate floor that the adjustment

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[4] *See* Petition at 8.

[5] Brief in Opposition at 8 n.3.

[6] *See* Petition at 12-13.

[7] Brief in Opposition at 8 n.3.

procedures would apply "to *every employee* working for the carrier" (Senator King), including "all classes and groups and individuals" (Senator Watson). Legislative History at 690-691 (emphasis added).

Finally, Luck argues that at the time of the Senate debates, the adjustment procedures under the Act were not compulsory. But even if that were true—which we do not concede—it is simply irrelevant to the inquiry here. This case concerns the interpretation of specific statutory language which has remained essentially unchanged since the Railway Labor Act was adopted in 1926. When the provision at issue was enacted, it was clear that the legislature intended the adjustment procedures to apply to all employees, including employees not represented by unions. Neither the 1934 amendment to the Act, nor any subsequent amendment, has changed the scope of the relevant statutory language or its meaning.[8]

As for the Adjustment Board's apparently narrow interpretation of its jurisdiction, that is a reason for granting certiorari, not denying it. This will not be the first time a federal agency has ignored the plain language of a governing statute and misinterpreted its own jurisdiction.[9]

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[8] Luck contends that *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972), held that the Act's adjustment procedures were mandatory "*only for* 'disputes over the interpretation of a collective bargaining agreement.'" Brief in Opposition at 8 (emphasis added). Of course, *Andrews* held nothing of the sort. Although the dispute at issue in *Andrews* involved interpretation of a collective bargaining agreement, the Court in no way held that the mandatory procedures were *limited* to disputes arising out of such agreements. That state court litigants such as Luck may find the decision susceptible to such an interpretation provides a persuasive reason to grant the Petition in this case.

[9] *See Louisville Cement Co.* v. *ICC*, 246 U.S. 638, 644 (1918) ("the interpretation which the Commission placed upon its jurisdictional power is erroneous"); *see also Public Employees Retirement Sys.* v. *Betts*, —— U.S. ——, ——, 109 S. Ct. 2854, 2863 (1989) ("no deference is due to agency interpretations at odds with

3. Federal case law supports the position that the Railway Labor Act preempts wrongful discharge claims filed by employees not represented by a union. Luck's attempt to square this federal authority with the decisions of the California Court of Appeal and other state courts is unpersuasive.[10]

Luck first asserts that *Thomas* v. *New York, Chicago & St. Louis R.R.*, 185 F.2d 614 (6th Cir. 1950), is inapposite because "[n]o issue of preemption was involved."[11] The issue of preemption was not addressed there, however, simply because the court was concerned with whether the National Railroad Adjustment Board had the authority to consider a wrongful discharge claim. Any judicial decision that defines the scope of the Board's jurisdiction, as did *Thomas*, necessarily describes those employee claims preempted by the Act.

Luck further argues that *Thomas* does not support petitioner's position because the Sixth Circuit "did not make clear whether the employee was simply a non-union member in a union-represented bargaining unit or whether, like Luck, he was an exempt employee not subject to a union contract."[12] The *Thomas* court's failure to make this specification, however, is irrelevant. The court indicated that the discharged employee could not "rely upon any union contract as to duration or tenure of employment." 185 F.2d at 617. Therefore, the wrongful discharge claim

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the plain language of the statute itself"); *Patterson* v. *Chicago & Eastern Illinois R.R.*, 50 F. Supp. 334 (N.D. Ill. 1943) (requiring Adjustment Board to take jurisdiction of dispute involving non-union employee).

[10] The California Court of Appeal recognized what it called "conflicting federal authority" on this issue, thereby conceding that its holding was contrary to the decisions of at least some federal courts. *See* Petition at App. 50a.

[11] Brief in Opposition at 9.

[12] Brief in Opposition at 9.

held in *Thomas* to be within the Board's jurisdiction clearly did not arise out of a collective bargaining agreement.

Luck is similarly unsuccessful in distinguishing *Womble* v. *Seaboard System R.R.*, 804 F.2d 635 (11th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987). Luck concedes that in *Womble*, the court relied upon *Thomas* in holding that a wrongful discharge claim brought by a non-union employee is preempted by the Act. Luck merely asserts, without explanation, that this reliance upon *Thomas* counts for little because the Eleventh Circuit also cited two cases involving "unionized employees covered by union contracts." [13]

Finally, Luck contends that *Hodges* v. *Atchison, T. & S.F. Ry.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984), is inapposite because the discharged employee in that case was represented by a union. Again, the claimant's inclusion in a collective bargaining unit is irrelevant because, as Luck, he was alleging a "breach of an employment agreement and not the collective bargaining agreement itself." *Id.* at 417.[14]

In short, those federal cases that have addressed the issue have held that the wrongful discharge claims of railroad employees are subject to adjustment and arbitration regardless of whether such claims arise out of a

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[13] Brief in Opposition at 9.

[14] The Tenth Circuit stated in *dicta* that "Mr. Hodges' employment in the craft governed by the applicable collective bargaining agreement makes him subject to the terms and conditions of employment obtained in the agreement * * *." 728 F.2d at 417. However, the court did not hold that Hodges' wrongful discharge claim arose from the collective bargaining agreement. The court could not have reached such a decision without addressing the merits of Hodges' claim. The court left it to the National Railroad Adjustment Board to resolve the contractual dispute, regardless of whether it ultimately was found to have arisen from an individual employment contract or a collective bargaining agreement.

collective bargaining agreement. Luck has not cited a single federal case squarely holding that wrongful discharge claims arising out of individual employment contracts are outside the ambit of the Railway Labor Act. Moreover, to the extent that she has identified ambiguity in federal decisions relied upon by petitioner, Luck has highlighted the necessity that certiorari be granted.[15]

4. Luck argues that this case "fall[s] within an exception to preemption developed by this Court for actions which seek to enforce minimum substantive guarantees provided to *all* employees." [16] That argument is wrongheaded.

Two of the cases cited by Luck merely held that an employee seeking to enforce a statutory *right of action* could, in some circumstances, bring such a suit outside of the Adjustment Board. *See Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557 (1987) (Federal Employers' Liability Act); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act). That is not the case here. In fact, the California Court of Appeal expressly *declined* to find a right of action in the California Constitution's privacy provision on which Luck relies.[17] Rather, the cause of action on

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[15] Luck asserts that two recent decisions by this Court have cast doubt upon the continued validity of the *dictum* from *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711 (1945), which states that the Board has jurisdiction over claims unrelated to the collective bargaining agreement. Nothing could be further from the truth. As explained below, *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557 (1987), simply held that FELA claims are not preempted by the Railway Labor Act. In *Consolidated Rail Corp.* v. *Railway Labor Executives' Association*, —— U.S. ——, 109 S. Ct. 2477 (1989), the Court obviously did not discredit *Burley*, a decision it cited with approval four times and quoted from at length. *Consolidated Rail*, like other cases cited at point 1 herein, expanded the National Railroad Adjustment Board's jurisdiction and its ability to decide disputes.

[16] Brief in Opposition at 11 (emphasis in original).

[17] *See* Petition at App. 29a-33a.

which Luck recovered was nothing more than a common law breach of implied contract claim—precisely the type of claim which this Court has held to be subject to the Act.

The other case cited by Luck, *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. 399 (1988), involved Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), which is expressly limited to suits "for violation of contracts *between an employer and a labor organization* representing employees." 29 U.S.C. § 185(a) (emphasis added). The Court's decision was grounded not upon an "exception" to preemption, but upon the fact that the dispute in that case did not require interpretation of a collective bargaining agreement.[18] That statute, unlike the one here, specifically referred to contracts between employers and labor unions—*i.e.*, collective bargaining agreements. That statute and the *Lingle* case, rather than supporting a denial of certiorari, demonstrate that Congress knows how to use restrictive language in describing agreements. It chose not to do so here.

Luck's argument comes down to the proposition that any time an employee alleges a violation of an amorphous "right to privacy," he or she can bypass the mandatory arbitration provisions of the Railway Labor Act. The same argument presumably would apply to those operat-

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[18] The United States Court of Appeals for the Ninth Circuit has recently rejected the argument that under *Lingle*, a claim based on California's privacy right is excepted from preemption under Section 301, holding such a claim to be "completely preempted under section 301 and properly dismissed on the merits." *See Stikes* v. *Chevron USA, Inc.*, —— F.2d ——, ——, Daily Lab. Rep. (BNA) No. 188, at E-1, E-3 (9th Cir. 1990); *see also Utility Workers of America* v. *Southern California Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1530 (1989) ("Drug testing does not implicate the sort of 'nonnegotiable state law rights' that preclude preemption under section 301.").

ing under collective bargaining agreements, since Luck casts the "exception" as a broad one to "preemption." [19] This most extraordinary "exception" has never been established by this Court, and Luck's argument in favor of it is another reason why certiorari is warranted.[20]

5. Luck's contention that Southern Pacific's "conduct amounted to a repudiation of the [Act's] administrative procedures" because Southern Pacific correctly stated that no "written grievance procedures" existed within the company is absurd.[21] That statement in no way "estops" Southern Pacific from relying on the mandatory adjustment procedures established by federal statute. In any event, this issue was not decided below and has no bearing on whether the Petition should be granted.

6. Finally, Luck claims that the case is limited by its unique facts. On the contrary, there are no unique facts. The decision below will affect thousands of workers not directly covered by collective bargaining agreements, in an industry where drug-testing is of immediate and

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[19] Brief in Opposition at 11.

[20] The three state court cases cited by Luck do not support her contention that certiorari should be denied. Two of the cases, *Evans* v. *Southern Pacific Transportation Co.*, 213 Cal. App. 3d 1378, 262 Cal. Rptr. 416 (1989), *cert. denied*, 110 S. Ct. 3213 (1990), and *Quinn* v. *Southern Pacific Transportation Co.*, 76 Or. App. 617, 711 P.2d 139 (1985), involved claims based on specific statutory causes of action. The other state court case, *Hollars* v. *Southern Pacific Transportation Co.*, 792 P.2d 1146 (N.M. App. 1989), *cert. quashed*, —— N.M. —— (1990), held that the analysis under *Lingle* applied to Section 3 First of the Railway Labor Act. Like the California Court of Appeal's decision in the instant case, *Hollars*' holding that the mandatory adjustment procedures under the Act were limited to disputes arising only under collective bargaining agreements—in contrast to the federal courts and in conflict with the plain language and legislative history of the Act—calls for this Court to grant certiorari and resolve this issue.

[21] Brief in Opposition at 13.

serious concern both to management and to the public and where uniformity is of paramount importance.[22]

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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[22] *See Roane* v. *Comair, Inc.*, 708 F. Supp. 802, 806 (E.D. Ky. 1989) ("A national policy is required to deal with the problem [of drugs in the workplace]. It is essential that this policy be uniform and uniformly applied. This is particularly true as to the rights and duties of * * * railroads * * * which operate across state lines and which are responsible for the safety of millions.").